Supreme Court, U.S.
F I L E

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BRUCE RICHARD TOSKI,

Petitioner,

v.

WILLIAM J. MCDONNELL
KENDALL G. WILLIAMS
JEFFERSON H. HENRY

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Bruce Richard Toski - *Petitioner pro se*
2361 S.W. 36th Terrace
Fort Lauderdale, FL 33312-4291
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84 pp

QUESTION PRESENTED

Whether the District Court erred by applying the narrow test for preemption articulated in *Andrews v. Louisville & N.R. Co., 406 U.S. 320 (1972)*, to find that all eight (8) of petitioner's claims were preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq., contrary to the plain language and intent of the RLA and the unanimous decision of the United States Supreme Court in *Hawaiian Airlines, Inc. V. Grant T. Norris (No. 92-2058), 512 U.S. ___, 129 Le.Ed.2d 203, 114 S.Ct 2239 (1994).*

PARTIES TO THE PROCEEDING

1. Anania, Francis A. - Counsel for respondents
2. Blackwell, Donald A. - Counsel for respondents
3. Davis, Edward B. - United States District Court Judge
4. Eastern Air Lines, Inc. - Assisted counsel for respondents
5. Friedman, Jonathan S. - Counsel *pro hac vice* for petitioner at the U.S. Court of Appeals
6. Henry, Jefferson H. - Respondent
7. Hite, M. Catherine - Counsel for respondents
8. McDonnell, William J. - Respondent
9. O'Brien, Richard F. - Counsel for respondents
10. Toski, Bruce Richard - Petitioner
11. Turnoff, William C. - U.S. District Court Magistrate
12. Williams, Kendall G. - Respondent

OPINIONS BELOW

Magistrate's Report re: Summary Judgment .....Appendix 67a
Judge Davis Order adopting Magistrate's Report .... Appendix 21a
Eleventh Circuit Court of Appeals Order affirming lower court decision..... Appendix 25a

JURISDICTION

Petitioner *pro-se*, filed suit against the respondents in Dade County Circuit Court under Case #90-51972-CA-01 (Appendix 1a) on October 23, 1990. The case was removed to federal court based on partial reference to federal labor law in Count IV. Plaintiff's nine (9) count complaint survived a Motion to Dismiss with the court only striking Count VIII and part of Count I (R. 1-21)[1]. Four years later, after denying the petitioner (1) an opportunity to amend his initial complaint (R. 6-168), and (2) oral argument, the district court issued an Order (Appendix 21a) granting the respondents' motion for summary judgment (R. 4-97) on January 31, 1994.

Appellant filed a timely appeal (R. 6-180) (Appendix 23a) to the Eleventh Circuit Court of Appeals on February 25, 1994. On December 10th, 1996, the U.S. Court of Appeals for the Eleventh Circuit affirmed (Appendix 25a) the lower court's decision.

On December 30, 1996, petitioner filed a suggestion for a rehearing en banc (Appendix 27a). The Court of Appeals for the Eleventh Circuit denied (Appendix 37a) this suggestion on February 26, 1997. Petitioner herein filed a Petition for Writ of Certiorari within the 90 day period specified in 28 U.S.C. § 2101(c). On June 5th, 1997 the clerk of this Court responded to said petition and allowed the petitioner 60 days to make necessary corrections.

This Court has jurisdiction to review this judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

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[1] References to the record. The first number is the volume #, the second number is the docket entry.

STATUTES & CONSTITUTIONAL PROVISIONS

AMENDMENT [VII.] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States , than according to the rules of the common law."

AMENDMENT [V.] "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

RAILWAY LABOR ACT The pertinent sections of the Railway Labor Act (RLA) 45 U.S.C. §151, *et seq.* are reproduced at Appendix 39a.

28 U.S.C. § 2101(c) "Any other appeal or any writ or certiorary intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

28 U.S.C. § 1254(1) "Cases on the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree..."

STATEMENT OF THE CASE

A. *Facts*. Petitioner Bruce Richard Toski was hired on as a shop laborer at Eastern Air Lines (EAL) on June 22, 1976. Subsequently, the petitioner joined the International Association of Machinists' union (IAM). In 1980 the petitioner was promoted to stock clerk and then to mechanic in 1984. On October 16, 1986 the second shift Ground Service Equipment (GSE) mechanics elected the petitioner as Shop Steward. The respondents herein, are three airline officers who directed, confirmed or ratified the discharge of the plaintiff from his employment at EAL. The relationship between the petitioner and the respondents was conditioned by federal laws, state laws, common law, and finally by the Collective Bargaining Agreement (CBA) entered into between EAL and the IAM. The CBA was made and

entered into in accordance with the provisions of the Railway Labor Act (*see* Preamble to the CBA). The labor contract was of three years duration, amenable on December 31, 1987 (CBA App. No. 26). Petitioner had fully served the 120 day probationary period specified in Article 7 of the CBA. Employees who had passed the probationary period accrued seniority and could only be discharged "for cause" (CBA Article 15E). Article 18 and 19 of the CBA stated the steps required by both EAL and the IAM in connection with terminations or discharges.

After 10 years meritorious service, the petitioner's employment at EAL was terminated by respondent Williams. This dismissal occurred one (1) day after the petitioner filed a report with the first aid department documenting an incident between respondent McDonnell and the petitioner. Said incident occurred with only two (2) minutes left to go at the end of the shift, when McDonnell attacked the petitioner, *in the men's room*, while attempting to serve him a disciplinary letter.

B. *Proceedings*. The petitioner complied with all of the procedures in Articles 18 and 19 of the CBA to appeal his discharge to the system Board of Adjustment (SBA). However, while petitioner's SBA appeal was pending, EAL , in 1989, filed for bankruptcy and all litigation was stayed by order of the bankruptcy court. Petitioner filed the requisite proof of claims against EAL in the N.Y. District Court. Apart from the EAL litigation, the petitioner filed a complaint (Appendix 1a) in October of 1990 against his former GSE supervisors (respondents) at EAL. EAL *was not* named as a party in this lawsuit. Four (4) years later, in February of 1994, the district court summarily decided - without benefit of oral argument - that the petitioner had no legal basis to a jury trial and granted (Appendix 21a) the respondents' motion for summary judgment. The Eleventh Circuit Court of Appeals affirmed (Appendix 25a) with a short paragraph stating that the petitioners' arguments were "meritless". The opinion refused to address the *on point*, unanimous decision of this Court clearly stated in *Hawaiian*

ines, Inc. V. Grant T. Norris, (No. 92-2058), 512 U.S. ___, 129 Airl.2d 203, 114 S.Ct 2239 (1994)(Appendix 47a) and failed to L.Eain *why* the arguments advanced by the petitioner were expritless".
"m

REASONS FOR GRANTING THE WRIT

The decision of the Eleventh Circuit Court of Appeals in the cas *sub-judice* is in direct conflict with several Supreme Court dec sions; *Hawaiian Airlines, Inc. v. Grant T. Norris* (No. 92-2058), 512 U.S.___ , 129 L.Ed.2d 203, 114 S.Ct. 2239 (1994), *Lingle v. Nor ge Div. of Magic Chef, Inc.*, 486 US 399, 108 S.Ct.1877 (1988), and finally *Walker v. Southern Railway Company,* 385 U.S. 196, 87 S. Ct. 365 (1966). Only *Norris* was decided subsequent to the order of the district court that granted summary judgment to the defndants. Although *Lingle* and *Walker* are on point, one only need loo to the learned decision in *Norris* for guidance and finality to prevent a breach of the appellant's substantive right to a trial by jury in the case *sub judice*.

Norris is on point factually and legally. The plaintiff in *Norris* - like the plaintiff herein - was an airline mechanic who was also terminated for alleged insubordination and refusing to perform an unsafe repair. Like the plaintiff herein, Norris appealed his termination to the SBA, and subsequently filed separate actions against the airline and against three (3) airline officers who directed, confirmed or ratified the retaliatory discharge. Like the case at bar, many of Norris's claims were dismissed by the trail court as being preempted by the RLA for alleged failures to exhaust administrative remedies. The Supreme Court of Hawaii reversed both cases, concluding that the RLA did not pre-empt respondent's state tort actions. *Norris v. Finazzo*, 74 Haw. 235, 842 P.2d 634 (1992); *Norris v. Hawaiian Airlines, Inc.*, 74 Haw 648, 847 P.2d 634 (1993). The court pointed to *Lingle* in which the Supreme Court held that a claim of wrongful termination in retaliation for filing a state worker's

compensation claim[2] did not require interpretation of a collective-bargaining agreement, but depended upon purely factual questions concerning the employee's conduct and the employer's motive. *Id.* at 407. One year later the Supreme Court affirmed and upheld the decision of the Supreme Court of Hawaii. In a *unanimous* decision the Court held:

> ". . .(W)e agree with the Supreme Court of Hawaii that (Norris's) claims for discharge in violation of public policy and in violation of the Hawaii Whistleblower Protection Act are not pre-empted by the RLA, and we affirm that court's judgment." *Norris* at 17.

Like Norris, the petitioner's claims are based primarily upon state law. Further, the petitioner's claims, e.g. Battery, Negligent Retention, etc., do not require interpretation of a collective bargaining agreement, but instead depend upon purely factual questions concerning the petitioner's conduct and the respondents' motives.

CONCLUSION

The U.S. Supreme Court has stated unequivocally that the RLA does not displace state legal rules providing substantive protection for employees, and that the RLA does not require extra contractual causes of action be heard by SBAs. For the reasons stated above, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed and remanded.

Respectfully submitted this 1st day of August, 1997.
/s/ Bruce Toski
Bruce Toski - Plaintiff, *pro se*
2361 S.W. 36 Terrace, Fort Lauderdale, FL 33312-4291
Tel: (954) 583-4191

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[2] Petitioner herein was terminated the day after he filed a Worker's Compensation claim with EAL's first aid department.

APPENDIX

ORDERS:

District Court Magistrate Turnoff's Report & Recommendation re: respondents' Motion for Summary Judgment *67a*
District Court Judge Davis' granting of the respondents' Motion for Summary Judgment 21a
U.S.C.A. (11th) opinion affirming above Order 25a
U.S.C.A. (11th) Order denying petition for rehearing 37a

STATUTES:

Railway Labor Act (RLA) 45 U.S.C. §151, et seq. 39a

OPINIONS RELEVANT TO THIS CASE:

Hawaiian Airlines, Inc. V. Grant T. Norris (No. 92-2058), 512 U.S. ___, 129 Le.Ed.2d 203, 114 S.Ct 2239 (1994) 47a

OTHER RELEVANT MATERIAL:

Original Complaint filed in Circuit Court 1a
Notice of Appeal to the Eleventh Circuit Court of Appeals 23a
Suggestion for Rehearing En Banc 27a

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

BRUCE RICHARD TOSKI,

Plaintiff,

CASE NO. 90 - 51972
JUDGE: ROBINSON

vs.

A JURY TRIAL IS DEMANDED

WILLIAM J. MCDONNELL,
JEFFERSON H. HENRY,
and
KENDALL G. WILLIAMS,

Defendants.
_____/

COMPLAINT

Plaintiff, BRUCE RICHARD TOSKI, pro se, sues the Defendants, WILLIAM J. MCDONNELL, JEFF HENRY, and KEN WILLIAMS, and alleges:

I. JURISDICTION AND PARTIES

1. The jurisdiction of this court is based on the amount in controversy, which exceeds for each Defendant, exclusive of costs and interest, the sum of $30,000.00.

2. Plaintiff is a student and resident of Broward County, Florida.

3. Plaintiff started working for Eastern Air Lines (hereinafter EAL or the company) on June 22, 1976 as a shop laborer. At the same time the Plaintiff joined the International Association of Machinists and Aerospace Workers (hereinafter IAMAW or the union), which acted as the chief bargaining agent for the Plaintiff in disputes arising out of employment. In 1980 Plaintiff was promoted

to the stock department. On April 24, 1984 Plaintiff was promoted to mechanic at the Ground Service Equipment (hereinafter GSE) shop under the supervision of Defendant HENRY. Plaintiff worked in the GSE shop until he was terminated by Defendant WILLIAMS on November 7, 1986.

4. Defendant, WILLIAM J. MCDONNELL, is a resident of Broward County, who was employed as Plaintiff's supervisor at EASTERN AIR LINES in Dade County, Florida.

5. Defendant, JEFF HENRY, is a resident of Broward County, who was employed as Plaintiff's foreman, and later as Plaintiff's general foreman at EASTERN AIR LINES in Dade County, Florida.

6. Defendant, KEN WILLIAMS, is a resident of Broward County, who was employed as Plaintiff's manager at EASTERN AIR LINES in Dade County, Florida.

7. The incidents complained of in this lawsuit all took place in Dade County, Florida.

8. The "Agreement" referred to in this complaint is incorporated by reference as "Exhibit A". The "Agreement" was made and entered into in accordance with the provisions of the Railway Labor Act, by and between EAL and the IAMAW. The purpose of the "Agreement" was basically to cover working conditions and disputes between EAL employees who are members of the IAMAW.

9. This court has jurisdiction over the claims herein, because, the grievance procedure governed by Articles 17-19 of the Agreement is no longer controlling or in effect. On the date of the filing of this lawsuit, Plaintiff and the IAMAW were still on strike against EAL. Arbitration has ceased to exist.

II. FACTS

10. On July 31, 1984, HENRY placed a written reprimand in Plaintiff's personnel file without notifying the Plaintiff. MCDONNELL referred to this reprimand in disciplinary letters issued to the Plaintiff dated October 23 and 24, 1986. These letters are incorporated by reference as Exhibit "D".

11. On November 27, 1984, Plaintiff was served a letter for "Job Performance" by Defendant HENRY. This letter concerned work performed by the Plaintiff on a forklift #4649. This letter is incorporated by reference as Exhibit "D".

12. Plaintiff filed a grievance to have the above letter removed from his personnel file. On April 12, 1988 the System Board of Adjustment (hereinafter SBA) convened to hear the grievance.

13. At the hearing above, WILLIAMS refused to produce the Ground Support Equipment Work Order (hereinafter GEARS) which documented work done by the Plaintiff on forklift #4649. (A copy of the applicable pages from the transcript of the hearing is incorporated by reference as Exhibit "E").

14. As a direct result of the Defendants' failure to produce the GEARS for the vehicle in dispute, the Plaintiff was unable to refute certain false statements made by the Defendants at the April 12, 1988 arbitration hearing.

15. On or around March of 1985 Plaintiff asked MCDONNELL, who was a union shop steward at the time, about the unavailability of a special socket needed to repair tractor axles, which Defendant Henry refused to obtain for shop use. (GSE parts request is incorporated by reference as Exhibit "C"). MCDONNELL told the Plaintiff, "Since everyone else is using a hammer and chisel instead of the special socket to remove the axle nut, you should do the same."

16. On May 7, 1985 Plaintiff filed two Potential Danger Observance Reports (hereinafter PDORs) with HENRY. These two PDORs are incorporated by reference as Exhibit "B"). EAL

encouraged the reporting of safety problems with a large placard, EAL stock part # 14GG0160. (A true sample of this placard is incorporated by reference and attached to Exhibit "B").

17. On May 7, 1985, as a direct result of filing the PDORs, HENRY complained to the GSE shop manager, who threatened the Plaintiff with disciplinary action for filing any more PDORs.

18. The above incident was directly witnessed by six (6) mechanics who worked with the Plaintiff on the third shift.

19. Upon information and belief, a written memo was placed in the Plaintiff's personnel file involving an alleged discussion concerning job performance with the Plaintiff on May 23, 1985. Plaintiff was never counseled in any disciplinary matter by former EAL foreman Mike Sikora and Plaintiff was never informed about the memo placed in his personnel file. MCDONNELL referred to this "discussion" in letters he issued to the Plaintiff dated October 23 and 24, 1986.

20. On or about January 1, 1986, MCDONNELL was promoted from mechanic to foreman.

21. Upon information and belief, MCDONNELL had received very little formal education and received minimal management training prior to his promotion. Soon after his promotion MCDONNELL attended a class titled "Confrontation Management."

22. On February 28, 1986, Plaintiff was served a "Letter of Reprimand" by MCDONNELL because the Plaintiff had been wearing a button stating "Frank is a Weenie." (This letter is incorporated by reference as Exhibit "D".)

23. Defendant MCDONNELL had threatened Plaintiff several times previously with termination if the button was not removed.

24. Plaintiff filed a grievance which was denied first by MCDONNELL and then by MCDONNELL's manager because, "This being the second letter, the grievance is denied."

25. Plaintiff had never been served with the first referenced letter. This letter, written by HENRY was dated February 15, 1985 and concerned the wearing of "a large button" on the Plaintiff's work

uniform. The IAMAW did not receive their copy until April 2, 1986. The Plaintiff did not receive a copy until after he was fired.

26. On or about April 11, 1986 Plaintiff was seated in the break room during lunch with two other mechanics. MCDONNELL entered the room and demanded to see the Plaintiff's flashlight. A few seconds later, MCDONNELL, acting with malicious intent and with alcohol on his breath, lunged at the Plaintiff and wrestled the flashlight from Plaintiff's belt.

27. Later the same day, MCDONNELL refused to allow the Plaintiff to confer with the shop steward about writing a grievance for the incident in ¶ 26. That night MCDONNELL ordered the Plaintiff to go home early.

28. On April 14, 1986, MCDONNELL served a letter of "Discipline" to the Plaintiff concerning work done by the Plaintiff on vehicles #2512 and #5663. (This letter is incorporated by reference as Exhibit "D".)

29. The letter above concerned 1) a diesel vehicle which had an illegal, noisy exhaust system, which the Plaintiff was attempting to repair on April 7, 1986, with improper parts which management had ordered and 2) Plaintiff was reprimanded for attempting to write a grievance with the shop steward about the incident between MCDONNELL and the Plaintiff in ¶ 26.

30. Upon information and belief, writing a grievance on company time was a common practice before MCDONNELL became the foreman in the GSE shop. While MCDONNELL was a shop steward he often wrote grievances on company time and/or used company time for union business.

31. Upon information and belief MCDONNELL removed the GEARS for the vehicles #2512 and #5663 from the filing cabinet where they were regularly stored. Plaintiff requested copies of the GEARS from MCDONNELL. MCDONNELL never produced copies for the Plaintiff and refused to allow Plaintiff to copy same.

32. On or about June 22, 1986, Defendant MCDONNELL, assigned two workers on overtime from day shift, to road-call duty

on second shift.

33. The assignment of workers to their jobs by MCDONNELL instead of by the lead man was a violation of past practice and Article 4B of the "Agreement" between the IAMAW and EAL.

34. MCDONNELL over-rode the lead man's objection and said, "Go file a grievance. I am going to keep Hyrtzay and Delgado on road call duty". Hyrtzay was a neighbor of MCDONNELL. This act by MCDONNELL prevented the Plaintiff from being assigned to road-call duty. Road-call duty was generally recognized as one of the better assignments in the GSE shop.

35. As a result of Plaintiff filing a grievance concerning the above incident, Jose Posadas (manager at that time of the GSE shop) issued a letter to MCDONNELL instructing him that, all mechanics will receive their assignments by the Lead Mechanic and not by the foreman on duty.

36. On or around July 16, 1986, MCDONNELL applied for an honorary withdrawal card from the IAMAW.

37. Plaintiff circulated a petition which was signed by twenty two (22) other mechanics, which stated in essence, that, because MCDONNELL was a very weak and ineffective shop steward and an even worse example of leadership as a foreman, he should be denied his honorary union withdrawal card.

38. MCDONNELL's application for honorary withdrawal was rejected by the membership of the IAMAW.

39. Following the rejection, MCDONNELL told several of Plaintiff's co-workers that he, (MCDONNELL), was a vindictive person and that he would get even with those people who signed the Plaintiff's petition. (This letter is incorporated by reference as Exhibit "F".)

40. On July 30, 1986 Plaintiff attended training class on his day off. MCDONNELL refused to pay Plaintiff as required under Article 6F(2) of the "Agreement." Plaintiff filed a grievance. Foreman Garner settled the grievance and paid the Plaintiff.

41. During August of 1986 the Plaintiff broke a hammer on the

job. It was standard policy that tools broken on the job would be replaced. Plaintiff gave this broken hammer to MCDONNELL. Two (2) months later Plaintiff questioned MCDONNELL about a replacement. MCDONNELL disavowed any knowledge of the prior conversation or having received the broken hammer. MCDONNELL said he would not get Plaintiff a new one.

42. On or about August 11, 1986, MCDONNELL charged the Plaintiff with being one-minute tardy for work and refused to pay Plaintiff for that one minute.

43. Plaintiff filed a grievance concerning MCDONNELL's refusal to pay Plaintiff for the one minute tardy. In the first step of the grievance HENRY refused to pay Plaintiff for the one minute. In the second step of the grievance, the manager Jose Posadas removed the tardy charged from the attendance roll and paid Plaintiff for the one minute.

44. On August 28, 1986, Plaintiff was served a letter concerning "Time Card Procedures" by HENRY. HENRY also refused to pay the Plaintiff for three hours of training class which the Plaintiff attended. (This letter is incorporated by reference as Exhibit "D".)

45. Plaintiff grieved the above letter. The three hours for attendance at a training class were ordered paid at an arbitration hearing on April 12, 1988.

46. On September 8, 1986, MCDONNELL issued Plaintiff a "Letter of Instruction" for not wearing the EAL uniform properly. (This letter is incorporated by reference as Exhibit "D".)

47. This letter concerned a situation where the Plaintiff was forced to work in the hot sun, in 100 degree weather, in an area out of public view. Plaintiff had removed his sticky, sweaty shirt in an attempt to cool down. MCDONNELL, who never left his air conditioned office, stated to the shop steward Tom Markham, that, the reason he (MCDONNELL) was making a big deal out of a shirt was because he wanted to harass the Plaintiff.

48. On September 10, 1986, after the Plaintiff had punched in to go to a training class - for which he was scheduled to attend -

MCDONNELL ordered the Plaintiff not to go to the class.

49. Plaintiff went to the training class - for which he was scheduled to go - and turned in a time card to be paid for the three hours spent in the training.

50. On September 11, 1986, Plaintiff was served a letter of "Reprimand" by MCDONNELL concerning the incident on September 10, 1986. The letter stated that the Plaintiff had "falsified a claim for pay." (This letter is incorporated by reference as Exhibit "D".) In addition MCDONNELL refused to pay the Plaintiff for the three hours of class.

51. Plaintiff grieved the above letter on October 2, 1986. The arbitrator for the SBA meeting of April 12, 1988 held that the Plaintiff had **not** falsified a claim for pay.

52. Manager Jose Posadas ordered MCDONNELL to stop harassing the Plaintiff in September, 1986. This directive came after a meeting between the Plaintiff and Jose Posadas in September, 1986, wherein the Plaintiff requested relief from the constant harassment of Defendant MCDONNELL.

53. On October 1, 1986, Jose Posadas was reassigned to Terminal Aircraft Line Maintenance.

54. Upon information and belief, Ken Williams was to replace Jose Posadas as the manager for the GSE shop. However, Defendant Williams would not arrive to take control of the GSE shop until Monday, November 3, 1986. In the meantime Jose Posadas was still presiding over both areas.

55. On October 16, 1986, Plaintiff was elected Shop Steward for the second shift GSE shop at the terminal.

56. On October 23, 1986, Plaintiff was served a letter of "Reprimand" and a letter concerning "Job Performance" and ordered to take five days off without pay by MCDONNELL. (These letters are incorporated by reference as Exhibit "D".)

57. On October 23, 1986, MCDONNELL twice refused Plaintiff's request to go on union business.

58. The next day, Plaintiff telephoned manager Jose Posadas and

asked him why he allowed MCDONNELL to give out another letter and time off to the Plaintiff.

59. Jose Posadas said that he was not even aware of the disciplinary actions by MCDONNELL and ordered MCDONNELL to rescind the "Job Performance" letter and the days off.

60. Plaintiff grieved the letter of "Reprimand" on October 24, 1986. The arbitrator at the SBA on April 12, 1988 ordered the letter removed from the Plaintiff's personnel file.

61. On October 24, 1986, Defendant MCDONNELL attempted to serve a letter concerning "Job Performance" on the Plaintiff in the bathroom, at 11:18 P.M., two minutes before punch out time.

62. At 11:18 P.M. on October 24, 1986, MCDONNELL followed the Plaintiff into the mens' bathroom. As Plaintiff was closing the door to the stall, MCDONNELL pushed on the door with intentional force sufficient to knock down the Plaintiff over the commode. As the Plaintiff stood up, MCDONNELL said, "Here, take your damn letter now!", and shoved the letter into the Plaintiff's breast pocket. MCDONNELL was shouting in Plaintiff's face and Plaintiff smelled the strong odor of alcohol on MCDONNELL's breath. Plaintiff reacted by trying to push MCDONNELL away. MCDONNELL thrust the Plaintiff backwards into the stall again. Plaintiff threw the letter out the door of the bathroom after MCDONNELL exited.

63. Defendant then picked up the letter off the floor and went to the Plaintiff's valise near the time clock. MCDONNELL then opened Plaintiff's valise and placed the letter inside.

64. Defendant MCDONNELL got into his work truck, left, then came back, stopped, got out, and went back to Plaintiff's valise, opened it, and removed the letter.

65. Shortly after 11:20 P.M., in the foreman's office, the Plaintiff was served the letter concerning "Job Performance" by MCDONNELL. (This letter is incorporated herein as Exhibit "D").

66. On October 28, 1986, HENRY telephoned Plaintiff at Plaintiff's home on Plaintiff's day off and apologized for

MCDONNELL's attack. HENRY asked the Plaintiff what he could do to appease the situation. Plaintiff replied that Henry should; 1) remove all disciplinary letters from Plaintiff's personnel file, 2) have MCDONNELL write a letter of apology, 3) pay Plaintiff for the one day not paid due to issuance of the April 14, 1986 letter by MCDONNELL, and 4) remove MCDONNELL from the second shift so that he would not come into further contact with the Plaintiff.

67. On October 30, 1986, MCDONNELL served every worker in the shop, except the Plaintiff, with a letter for alleged violation of break time limits.

68. Early in the shift on October 31, 1986, HENRY asked the Plaintiff to come into the office to "work things out man to man."

69. HENRY refused to allow the Plaintiff to tape record the conversation that followed. HENRY apologized for MCDONNELL'S actions but said that he could not discipline MCDONNELL, that such action would have to come from Defendant WILLIAMS, who would be the new manager of the GSE shop on November 3, 1986. Plaintiff then requested that Henry set up a meeting between the Plaintiff and Defendant Williams. HENRY promised to set up such a meeting for November 3, 1986.

70. On November 3, 1986, Plaintiff attended a meeting with Defendant Williams, to discuss the attack on the Plaintiff by MCDONNELL. WILLIAMS told the Plaintiff that he would make a decision concerning MCDONNELL after he (WILLIAMS) had talked with Jose Posadas. **In fact** WILLIAMS never contacted Jose Posadas to discuss the incident.

71. On November 6, 1986, Plaintiff filled out a written form in the first aid department documenting the attack by Defendant MCDONNELL in the bathroom.

72. On November 7, 1986, WILLIAMS, through Paul Priest of EAL's Labor Relations Department, requested a cursory medical examination of the Plaintiff by Eastern's Medical Doctor.

73. On November 7, 1986, Plaintiff was issued a letter by WILLIAMS which stated that the Plaintiff was terminated

immediately for "serious violations of various rules and regulations." (This letter is incorporated by reference as Exhibit "D").

74. When the Plaintiff was led off the property his airport base pass and employee I.D. were confiscated by WILLIAMS.

75. On November 17, 1986, the Plaintiff, in an attempt to avoid another confrontation with MCDONNELL, assigned another shop mechanic of the GSE shop to bring the Plaintiff's tools home. MCDONNELL confiscated a number of Plaintiff's tools before he would allow the Plaintiff's tool boxes to be taken home by Plaintiff's assignee.

76. It was necessary for the Plaintiff (1) to drive to the job situs and (2) call the head of Eastern Air Line's security department before MCDONNELL acquiesced control of the remainder of Plaintiff's tools into Plaintiff's possession.

77. On June 6, 1987, the Plaintiff demanded a base pass from EAL Protective Services. A pass was necessary so that the Plaintiff could return onto the airport property so that Plaintiff could continue to represent the employees that elected him. Plaintiff's request for a pass was denied. The reason given was that the Plaintiff had been terminated by WILLIAMS and would not be allowed back on base.

78. On June 6, 1987, Plaintiff requested a pass from the Metro Dade Aviation Department. The request was denied based on EAL's refusal to grant permission to the Aviation Department.

79. On June 6, 1987, the Plaintiff requested access to the airport property at the Metro Police Department Substation across from the GSE shop in the Miami International Airport. Plaintiff was told that no action would commence without a court order. They advised the Plaintiff that, if he insisted on asserting his rights by forcefully entering EAL's property at the airport, and EAL requested Plaintiff's arrest for trespassing, that in all likelihood they would arrest the Plaintiff.

80. The Plaintiff, through General Chairman Ronald Orr of District 100, on 07/07/87, requested a pass through Mr. John MacDonald of the EAL Personnel Dept. Once again, based on the

termination of the Plaintiff by WILLIAMS the request was denied.

81. At each contact the Plaintiff informed EAL's officers and agents about the RLA and the clear wording of 45 U.S.C. § 152. Most of the replies ran along the lines of, "So what ...take us to court." The most memorable, though, came from Paul Priest who I talked with on 06/23/87 while in the Protective Services office. Paul Priest stated, "It'll be a cold day in hell when I give you a pass."

COUNT I - BATTERY
(AGAINST WILLIAM J. MCDONNELL)

82. Plaintiff re-alleges all preceding paragraphs, and further alleges:

83. Defendant WILLIAM J. MCDONNELL's drunken act of striking Plaintiff during an attempt to serve a disciplinary letter was willful and wanton and constituted a battery upon Plaintiff.

~~84. Defendant WILLIAM J. MCDONNELL's drunken, act of lunging at Plaintiff and grabbing the flashlight from his belt was willful and wanton and constituted a battery upon Plaintiff.~~ (struck by court subsequent to motion for dismissal)

85. In ~~both~~ incidents above Defendant MCDONNELL acted with malicious intent and without the Plaintiff's permission.

86. As a direct and proximate result of MCDONNELL's intentional acts of battery, the Plaintiff suffered, including but not limited to spraining his hip, emotional distress, loss of property, loss of benefits, and lost wages.

87. WHEREFORE, Plaintiff demands judgment against Defendant MCDONNELL for his damages, including the pain and suffering, disability, impairment of his bodily functions, medical expenses, lost earnings and punitive damages.

COUNT II NEGLIGENT RETENTION
(AGAINST JEFF HENRY and KEN WILLIAMS)

88. a. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

89. Defendant MCDONNELL was acting in the course and scope of his employment as Plaintiff's supervisor at the times that he struck and injured the Plaintiff.

90. During all times and incidents complained of heretofore, the Plaintiff was legally on the premises when harassed and/or attacked by MCDONNELL.

91. The Plaintiff came into contact with MCDONNELL as a direct consequence of the employment of MCDONNELL as Plaintiff's supervisor.

92. On occasions prior to and following MCDONNELL's attacks on the Plaintiff, MCDONNELL had demonstrated animus towards Plaintiff. Plaintiff and other persons had given active and/or constructive notice to HENRY and WILLIAMS concerning same.

93. Defendants HENRY and WILLIAMS failed to make a reasonable investigation into Plaintiff's (and others) assertions that MCDONNELL's behavior was hostile, erratic and a danger to the mechanics he was there to supervise.

94. Defendants HENRY and WILLIAMS knew or should have known the impropriety of retaining MCDONNELL in a supervisory position with a coincident high degree of personal interface.

95. Nevertheless, HENRY and WILLIAMS did nothing to counsel MCDONNELL regarding his conduct or attitude towards Plaintiff, did not discharge or reassign MCDONNELL, and thereby encouraged MCDONNELL to continue in his course of conduct aimed at causing injury, both physical and mental, to Plaintiff.

96. As masters, HENRY and WILLIAMS breached their duty to exercise reasonable care under the circumstances herein, to control MCDONNELL, a servant acting under their control, in order to prevent MCDONNELL from intentionally harming others and from creating an unreasonable risk of bodily harm to them.

97. At the time of the incidents alleged heretofore, MCDONNELL answered to HENRY as master. Upon information and belief, after November 1, 1986, HENRY answered to WILLIAMS as master.

98. HENRY and WILLIAMS are liable for the injuries caused by MCDONNELL under the doctrine of respondeat superior.

WHEREFORE Plaintiff demands judgment against Defendants HENRY and WILLIAMS for his damages, including pain and suffering, disability, medical expenses, lost wages, and punitive damages.

COUNT III WRONGFUL DISCHARGE
(AGAINST KEN WILLIAMS)

99. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

100. The purpose of Plaintiff's filing of a report with the Medical Department of EAL on November 6, 1986, was to establish a record of the injuries sustained during the attack by MCDONNELL for purposes of collecting worker's compensation at a later date if his injuries should become so severe that it was warranted.

101. On November 7, 1986, Plaintiff was terminated by WILLIAMS specifically on account of his having filed the report described in the paragraph above. The act by WILLIAMS of discharging Plaintiff because of his valid attempt to claim compensation under the Workers' Compensation Law is a violation of § 440.205 Fla. Stat. (1987), which states that "no employer shall discharge, threaten to discharge, intimidate or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law."

102. Plaintiff hereby accepts his discharge as final but only to the extent that, but for the wrongful discharge, Plaintiff would have worked at Eastern until March 4, 1989, and the Defendants are liable for back wages and benefits up until that time.

103. Pursuant to § 448.08 Fla. Stat. (1987), this court may award to the Plaintiff costs of the action and a reasonable attorney's fee for having to bring this action for unpaid wages due to the wrongful

discharge.

WHEREFORE Plaintiff requests restitution for all wages and other perquisites of employment that he would have received but for the wrongful discharge by Defendant WILLIAMS.

COUNT IV - NEGLIGENCE PER SE
UNFAIR LABOR PRACTICES
(AGAINST MCDONNELL, HENRY and WILLIAMS)

104. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

105. In Florida union members and representatives are protected under §§ 447.01 et. seq. Fla. Stat. (1987) and under the Railway Labor Act 45 U.S.C.A. §§ 151 et. seq. (West 1972).

106. Plaintiff was a member and representative of the IAMAW, which belongs to the class the RLA and §§ 447.01 et. seq. are intended to protect.

107. The RLA and §§ 447.01 et. seq. Fla. Stat. are intended to protect against the type of harassment, coercion and subju-gation which the Plaintiff was subjected to by the Defendants.

108. First, Defendant MCDONNELL violated 45 U.S.C.A. § 152 (Third) (West 1972) of the Railway Labor Act and § 447.09(2) Fla. Stat. (1987). By attempting to coerce and influence mechanics in the GSE shop prior to the election of Plaintiff as shop steward, MCDONNELL tried to prevent Plaintiff's election as shop steward.

109. Second, Defendants MCDONNELL, HENRY, and WILLIAMS violated, 45 U.S.C.A. §§ 152 (First and Second) (West 1972) and § 447.09(11) Fla. Stat. (1987) by failing to exert every reasonable effort to make and maintain the agreement (between the IAMAW and the EAL) and to settle all disputes in an expeditious manner.

110. Third, Defendants MCDONNELL, HENRY, and WILLIAMS violated 45 U.S.C.A. § 152 (Third) (West 1972) of the Railway Labor Act and § 447.09(11) Fla. Stat. (1987) by refusing to allow the Plaintiff access to the employees that elected him after he

(the Plaintiff) was terminated. The Railway Labor Act clearly states that, "Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier...." Since employment with the company (EAL) is not a prerequisite to be a representative, Plaintiff's rights were abridged when Defendants refused to allow the Plaintiff back on base - after he was terminated - to continue to represent the employees that elected him.

111. Defendants intentionally and maliciously breached their duty to the Plaintiff under conduct proscribed by the RLA and the Florida Statutes. As a proximate result thereof the Plaintiff suffered mental and physical anguish, loss of wages and benefits.

112. Defendants were conspirators in an intentional and malevolent plan to concentrate termination efforts on the front line leadership of the IAMAW, the shop stewards. As a proximate result thereof, the prospective advantage of the Plaintiff was considerably diminished.

WHEREFORE, Plaintiff demands judgment against Defendants MCDONNELL, HENRY, and WILLIAMS, compensatory fines as specified in 45 U.S.C.A. § 152 (Tenth) (West 1972) of the Railway Labor Act and § 447.14 Fla. Stat. (1987), compensation for lost wages and benefits, and punitive damages such as the Court may deem reasonable.

COUNT V
BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
(AGAINST MCDONNELL, HENRY, and WILLIAMS)

113. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

114. Plaintiff was employed at EAL from 1976 until 1986, and received numerous commendation letters and references. The constructive discharge conspired by the Defendants without legal cause, after many years of dedicated employment offends the implied-in-law covenant of good faith and fair dealing contained in

all contracts.

WHEREFORE, Plaintiff demands judgment against Defendants MCDONNELL, HENRY, and WILLIAMS for all the wages that he would have received but for their tortious actions, including pension benefits, welfare and health benefits, perquisites of employment and interest, and punitive damages.

COUNT VI - BREACH OF CONTRACT
(AGAINST MCDONNELL, HENRY, and WILLIAMS)

115. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

116. Plaintiff was fired without the required investigation stated on page 105 (Appendix 14) of the "Agreement" between the IAMAW and Plaintiff's employer.

117. Plaintiff was fired without a complete review of prior performance and work history.

118. The letters issued by Defendant MCDONNELL to the Plaintiff on April 14, 1986 and on October 23, 1986; and the letter issued by HENRY on November 27, 1984, were direct violations of Article 18 of the "Agreement" between the IAMAW and EAL which states that no employee shall be disciplined without first being advised in writing of the charge, not later than five days from the time of the incident.

119. The placing of a disciplinary letter in the Plaintiff's personnel file, by HENRY (see ¶ 10), without notice to the Plaintiff, violated Plaintiff's right to due process guaranteed under Article 17 et. seq. of the "Agreement."

120. The reference by MCDONNELL (¶ 19) to the "memo" placed in the Plaintiff's personnel file without notice to the Plaintiff, violated Plaintiff's right to due process guaranteed under Article 17 et. seq. of the "Agreement."

121. Defendants MCDONNELL, HENRY, and WILLIAMS have violated the preamble of the "Agreement" between the IAMAW and EAL which states, "No employee covered by this Agreement will

be interfered with, restrained, coerced, or discriminated against by the Company, its officers or agent, because of membership in or lawful activity permitted under the Railway Labor Act...on behalf of the Union."

122. Plaintiff was threatened by Defendants MCDONNELL, HENRY and WILLIAMS for filing PDORs and making other safety complaints and/or attempting to fix equipment properly instead of "rigging" it.

123. The threats above were in direct violation of numerous missives sent by EAL to its employees concerning "quality work", and Eastern Air Line Standard Practice § 52-1501.

124. Where an employer commits violations of its own firing policies and/or fails to review prior performance and work history of an employee targeted for termination, negligence lies.

WHEREFORE, Plaintiff demands judgment against Defendants MCDONNELL, HENRY, and WILLIAMS for all the wages that he would have received but for their intentional and malicious actions, including pension benefits, welfare and health benefits, perquisites of employment and interest, and punitive damages.

COUNT VII
FAILURE TO PROTECT EVIDENCE FOR PLAINTIFF'S BENEFIT
(AGAINST MCDONNELL and HENRY)

125. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

126. When Plaintiff filed grievances, Defendant's were under a duty to retain and protect any evidence pertaining to said grievance which would foreseeably involve facts under dispute.

127. Defendants have failed to retain and protect evidence which would have benefited the grievant-Plaintiff. For example the Defendants stated that they no longer had in their possession the GEARS for forklift #4649 at the SBA arbitration on April 12, 1988.

128. As a proximate result of Defendants' intentional and malicious actions the Plaintiff's prospective bargaining advantage was severely hampered.

WHEREFORE Plaintiff requests that this Court grant relief and damages for any instances herein alleged or any instances which may occur during ensuing discovery proceedings, where the Defendants have withheld or failed to protect evidence beneficial to the Plaintiff.

COUNT VIII - MALICIOUS PROSECUTION
(AGAINST MCDONNELL, HENRY AND WILLIAMS)

129. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

130. MCDONNELL harassed the Plaintiff and singled him out for discipline. (An affidavit from R.D. Wellbaum is incorporated by reference as Exhibit "G".)

131. Defendants MCDONNELL, HENRY and WILLIAMS have subjected the Plaintiff to malicious prosecution in that:

a) HENRY has commenced several disciplinary letters against the Plaintiff, MCDONNELL has commenced several disciplinary letters against the Plaintiff and given the Plaintiff time off, and WILLIAMS terminated the Plaintiff;

b) the majority of these disciplinary actions have been or will be terminated and adjudicated in favor of the Plaintiff;

c) all disciplinary actions metered to the Plaintiff by the Defendants were devoid of probable cause;

d) all three of the Defendants, through their actions and their words, have demonstrated malice toward the Plaintiff; and

e) the Plaintiff has been damaged physically, monetarily, and mentally by the prosecutions of the defendants.

WHEREFORE the Plaintiff demands judgment against Defendants MCDONNELL, HENRY and WILLIAMS, jointly and severally, for all damages suffered by the Plaintiff including pain and suffering for his physical injuries, the value of wages lost, and future wages lost, interest, legal and attorneys' fees.

COUNT IX - CONSPIRACY
(AGAINST MCDONNELL, HENRY and WILLIAMS)

132. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

133. Defendants MCDONNELL, HENRY, and WILLIAMS conspired between them to deprive Plaintiff of his employment and to cause him physical injury and emotional distress.

134. The Defendants are jointly and severally liable for the Plaintiff's injuries and damages.

WHEREFORE the Plaintiff demands judgment against Defendants MCDONNELL, HENRY and WILLIAMS, jointly and severally, for all damages suffered by the Plaintiff including pain and suffering for his physical injuries, the value of wages lost, and future wages lost, interest, legal and attorneys' fees.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

BRUCE RICHARD TOSKI,
Plaintiff,

v.

CASE NO. 91-112-CIV-DAVIS
MAGISTRATE TURNOFF

WILLIAM J. McDONNELL
JEFF HENRY, AND
KEN WILLIAMS,
Defendants.
_____/

ORDER ADOPTING MAGISTRATE'S REPORT & RECOMMENDATION

Before the Court is Defendants' Motion for Summary Judgment (D.E. 97). This matter was referred to Magistrate Judge William C. Turnoff for report and recommendation.

The Court adopts the Report and Recommendation of the Magistrate Judge in its entirety. For the reasons stated by the Magistrate Judge, and after independent review of the record, the Objections of the Plaintiff and the Defendants' response to the Objections, it is

ORDERED AND ADJUDGED that the Defendants' Motion for Summary Judgment is GRANTED. All pending motions not otherwise ruled upon are DENIED as MOOT. The case is CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of January, 1994.

_____
EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

cc: Bruce Richard Toski
Donald Blackwell

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

BRUCE RICHARD TOSKI,
Plaintiff,

v.

WILLIAM J. MCDONNELL, JEFFERSON H. HENRY, and KENDALL G. WILLIAMS,
Defendants.

Case No. 91-0112-CIV-DAVIS

NOTICE OF APPEAL

Notice is hereby given that BRUCE RICHARD TOSKI, plaintiff above named, pro-se and forma pauperis, appeals to the United States Court of Appeals for the 11th Circuit, from the ORDER granting the defendants' Motion for Summary Judgment, entered in this action on the 31st day of January, 1994.

Respectfully submitted,

/s/ _____

Bruce Toski - Plaintiff, pro se
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4246
Non-Argument Calendar

D.C. Docket No. 91-112-CIV-EBD

[DO NOT PUBLISH]

BRUCE RICHARD TOSKI,
Plaintiff,-Appellant,

versus

WILLIAM J. McDONNELL,
JEFF HENRY,
KEN WILLIAMS,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

(December 10, 1996)

Before BIRCH, DUBINA, and CARNES, Circuit Judges

PER CURIAM:

Appellant Bruce Richard Toski ("Toski") appeals from the district court's grant of summary judgment in favor of the defendants and against Toski regarding his pro se claims brought under the

Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-163, 181-88, and his supplemental state common law claims, 28 U.S.C. § 1367, arising out of his employment with and discharge by Eastern Airlines.

Our review of the record persuades us that each of the arguments Toski makes concerning his procedural challenges to various orders of the district court and his arguments relative to the district court's grant of summary judgment for the defendants are meritless. Accordingly, we affirm the district court's procedural orders and the grant of summary judgment in favor of the defendants and against Toski.

AFFIRMED.[1]

---

[1] We also deny all pending motions in this case

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 94-4246

BRUCE RICHARD TOSKI,
Petitioner / Appellant,

v.

WILLIAM J. MCDONNELL,
JEFFERSON H. HENRY and
KENDALL G. WILLIAMS,
Defendants / Appellees

On Appeal from an Order (December 10th, 1996) of the Eleventh Circuit affirming a Final Order from the U.S. District Court for the Southern District of Florida granting Summary Judgment in a Civil Case

---

SUGGESTION OF REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for appellant Bruce Richard Toski, certifies that the following is a complete list of the trial judges, all attorneys, persons, associations of person, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party:

1. Anania, Bandklayder & Blackwell - attorneys for the appellees
2. Anania, Francis A. - attorney / appellees
3. Blackwell, Donald A. - attorney for appellees
4. Davis, Edward B. - United States District Court Judge
5. Eastern Air Lines - Assisting defense counsel
6. Friedman, Jonathan S. - Counsel *pro hac vice* for Appellant
7. Henry, Jefferson H. - Defendant
8. Hite, M. Catherine - attorney for appellees
9. McDonnell, William J. - Defendant
10. O'Brien, Richard F. - attorney for appellees
11. Toski, Bruce Richard - Plaintiff
12. Turnoff, William C. - United States District Court Magistrate
13. Williams, Kendall G. - Defendant

VERIFIED STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following *unanimous* decision of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court.

See: Hawaiian Airlines, Inc. v. Grant T. Norris (No. 92-2058), 512 U.S.___ , 129 L.Ed.2d 203, 114 S.Ct. 2239 (1994).

Attorney *pro hac vice* for appellant

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TABLE OF CONTENTS

ARGUMENT AND AUTHORITY..... 5,6,7,8
CERTIFICATE OF INTERESTED PERSONS.C1
CERTIFICATE OF SERVICE..... 9
CONCLUSION..... 9
FACTS, STATEMENT OF..... 3,4
ISSUE, STATEMENT OF..... 1
PROCEDURAL HISTORY..... 2
VERIFIED STATEMENT FROM COUNSEL..V1

CITATIONS

CASES

Hawaiian Airlines, Inc. v. Grant T. Norris
(No. 92-2058) (1994).....V-1,5-9

Hawaiian Airlines, Inc. v. Grant T. Norris
74 Haw 648, 847 P.2d 634(1993)..... 7

Lingle v. Norge Div. of Magic Chef, Inc.
486 US 399(1988).....6,7,8

STATUTES

45 U.S.C. §151, *et seq.* (RLA).....2,6,7

STATEMENT OF THE ISSUE

THE DISTRICT COURT ERRED IN APPLYING THE LAW AND THE FACTS WHEN IT RULED THAT PLAINTIFF'S FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES UNDER THE COLLECTIVE BARGAINING AGREEMENT BARRED ALL OF HIS CLAIMS. IN FACT, THE PLAINTIFF HAD EXHAUSTED HIS ADMINISTRATIVE REMEDIES, NOTWITHSTANDING THAT NEITHER EXHAUSTION NOR COMMENCEMENT WAS REQUIRED PRIOR TO FILING A LAWSUIT AGAINST THE DEFENDANTS FOR EIGHT (8) COUNTS OF VARIOUS CLAIMS BASED, IN PRINCIPAL, ON STATE LAW.

PROCEDURAL HISTORY

Appellant, acting *pro-se*, filed suit against the defendants[1] in Dade County Circuit Court under Case #90-51972-CA-01 on October 23, 1990. The case was removed to federal court based on partial reference to federal labor law in Count IV. Plaintiff's nine (9) count complaint survived a Motion to Dismiss with the court only striking Count VIII and part of Count I. After denying the appellant an opportunity to amend his initial complaint, the district court granted the defendants' motion for summary judgment on January 31, 1994. The court found that the plaintiff failed to exhaust available administrative remedies and that his claims were pre-empted by the Railway Labor Act (RLA) 45 U.S.C. §151, *et seq.*

Appellant filed a timely appeal to the Eleventh Circuit Court of

---

[1] The defendants were acting as plaintiff's supervisors at Eastern Air Lines (EAL). EAL was sued separately in the Bankruptcy Court of New York and is *not* a party herein.

Appeals, which, on December 10th, 1996, affirmed the district court's granting of summary judgment in favor of the defendants.

On December 30, 1996, appellant retained counsel *pro hac vice* in order to assert his suggestion for a rehearing *en banc*.

STATEMENT OF NECESSARY FACTS

When defendant Williams issued a termination letter to the plaintiff on November 7th, 1986, the plaintiff was forced to leave his role as a mechanic and Shop Steward at Eastern Air Lines. Plaintiff's meritorious ten (10) years of service at Eastern Air Lines came to an abrupt end. Defendant Williams, who was acting as the plaintiff's manager, terminated the plaintiff for alleged insubordination and for filing a worker's compensation claim documenting a battery on the plaintiff by defendant McDonnell. On October 24th, 1986 Defendant McDonnell, while acting as plaintiff's supervisor, attacked the plaintiff in the men's room of the Ground Service Equipment (GSE) shop at EAL in an attempt to serve a disciplinary letter on the plaintiff. Said letter stemmed from plaintiff's refusal to perform an unsafe repair - ordered by defendant McDonnell - on ground equipment owned by EAL. Defendant Henry, in his capacity as a GSE foreman at EAL, conspired with defendants Williams and McDonnell to deprive the plaintiff of his gainful employment at EAL. But for the tortious actions of the defendants, plaintiff would have been employed for approximately three (3) more years at EAL.

Plaintiff, in compliance with the procedures set forth in the Collective Bargaining Agreement (CBA) agreed upon between the International Association of Machinist (IAM) and EAL, filed a timely grievance to appeal disciplinary letters and his termination to the System Board of Adjustment. The termination grievance never went before an arbitration tribunal due to a huge backlog of pending grievances, lengthy delays in the arbitral process, appeals,

and the stay on litigation placed by EAL' bankruptcy petition filing in 1989.

ARGUMENT AND AUTHORITY

The decision of the Eleventh Circuit Court of Appeals in the case *sub-judice* is in direct conflict with precedent of the Supreme Court of the United States as expressed in Hawaiian Airlines, Inc. v. Grant T. Norris (No. 92-2058), 512 U.S.___ , 129 L.Ed.2d 203, 114 S.Ct. 2239 (1994). Unfortunately, in the case at bar, the district court did not have the benefit of the U.S. Supreme Court's ruling in Norris which was decided subsequent to the district court granting summary judgment. This important case should be considered and applied by this court to prevent a breach of the appellant's substantive right to a trial by jury.

In Norris, an airline mechanic working at Hawaiian Air Lines (HAL) was also terminated for alleged insubordination and refusing to perform an unsafe repair. Norris appealed his termination according to CBA procedures, but abandoned the grievance procedures after HAL offered to return Norris to work without backpay. Norris subsequently filed suit against HAL in Hawaii circuit court, alleging two wrongful discharge torts - discharge in violation of public policy and discharge in violation of Hawaii's Whistleblower Protection Act. Id at 3. Norris also alleged that HAL had breached the CBA. As in the case at bar, Norris's action was removed to federal district court. Norris's claim for breach of the CBA and his claim for discharge in violation of public policy were subsequently dismissed, as being pre-empted by the RLA. In the meantime Norris had filed a second lawsuit in state court against three (3) of HAL's officers who allegedly directed, confirmed or ratified the retaliatory discharge. He again sought relief for discharge in violation of public policy and the Whitleblower's Act. The Hawaii trial court dismissed the two

counts as pre-empted by the RLA. Id at 4. The Supreme Court of Hawaii reversed in both cases, concluding that the RLA did not pre-empt respondent's state tort claims. Id at 4. The court pointed to Lingle v. Norge Div. of Magic Chef, Inc. 486 US 399, 108 S.Ct.1877 (1988), which held that a claim of wrongful termination in retaliation for filing a state worker's compensation claim did not require interpretation of a collective-bargaining agreement, but depended upon purely factual questions concerning the employee's conduct and the employer's motive. Norris at 4. The Supreme Court adopted the Lingle standard, Norris at 14, and held:

> ". . .(W)e agree with the Supreme Court of Hawaii that (Norris's) claims for discharge in violation of public policy and in violation of the Hawaii Whistleblower Protection Act are not pre-empted by the RLA, and we affirm that court's judgment." Id at 17.

In the case at bar the district court granted summary the defendants' motion for summary judgment based on the alleged failure of the plaintiff to exhaust his administrative remedies. (R6-174, p.5). These issues are addressed in Norris , which is controlling and on point, factually and legally, with the case *sub judice*. Grant T. Norris, ***like the appellant herein***, was a mechanic for a major airline and terminated for alleged insubordination in violation of a collective bargaining agreement (CBA). Norris, ***like the appellant herein***, appealed his termination under the CBA grievance procedures, and subsequent to his arbitration hearing, filed separate actions in state court against the airline carrier and its officers. As in the case *sub judice*, the trial court ruled that mechanic Norris's claims were pre-empted by the Railway Labor Act (RLA). On appeal the Supreme Court of Hawaii, reversing , expressed the view that mechanic Norris's state tort claims were ***not*** pre-empted by the RLA. *See* Norris 74 Haw 648, 847 P.2d 634 (1993). On certiorari, the United States Supreme Court

affirmed. In an opinion by Blackmun, J., expressing the **unanimous** view of the court, it was held that the RLA did not pre-empt Norris's state law causes of action, and thus Norris was *not* required to seek redress solely through the RLA's arbitral mechanism. Like Norris, the appellant's claims are based primarily upon state law. Further, the appellant's claims, e.g. Battery, Negligent Retention, etc., do not require interpretation of a collective bargaining agreement, but instead depend upon purely factual questions concerning the appellant's conduct and the defendants' motives.

In Norris the Supreme Court relied on Lingle v. Norge Div. of Magic Chef, Inc. 486 US 399, 108 S.Ct.1877 (1988). Lingle, also, is *on point* and relevant. In Lingle, the plaintiff - as in the case *sub-judice* - was terminated for allegedly filing a false worker' compensation claim. In Lingle , the plaintiff - as in the case *sub-judice* - filed a grievance to contest her discharge. In Lingle , the plaintiff's claims, as in the case *sub-judice,* were filed in state court while her grievance was pending. Her complaint was *also* dismissed under the same pre-emption argument asserted by the defendants herein. The Supreme Court stated that state claims are pre-empted only if the plaintiffs claims can be decided solely through interpretation of the CBA. Id at 1885. In the case at bar, most, if not all, of appellant's claims can be decided independent of interpretation of the collective bargaining agreement. Thus, as stated in Lingle and Norris, appellant's claims are not pre-empted by failure to exhaust any administrative remedy or the RLA.

CONCLUSION

It is proper for this court to review its Order filed on December 10th, 1996, wherein this court affirmed the district court's granting of summary judgment in favor of the defendants. Remand to the district court would prevent a precedent setting error which would directly conflict with Norris.

Respectfully submitted this 31st day of December, 1996.

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By: _____
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4246

BRUCE RICHARD TOSKI,

Plaintiff,-Appellant,

versus

[Stamped 02/26/97 by Clerk]

WILLIAM J. McDONNELL,
JEFF HENRY, KEN WILLIAMS,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S)
OF REHEARING EN BANC

Before BIRCH, DUBINA, and CARNES, Circuit Judges
PER CURIAM:
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ (Joel F. Dubina)
UNITED STATES CIRCUIT JUDGE

TITLE 45 - RAILROADS

CHAPTER 8. RAILWAY LABOR

GENERAL PROVISIONS

45 USCS @ 152 (1990)

*** THIS SECTION IS CURRENT THROUGH 101 P.L. 507, APPROVED 11/05/90 ***

@ 152. General duties

First. Duty of carriers and employees to settle disputes. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives. Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the

designation of representatives by the other and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining freedom from interference by carrier assistance in organizing or maintaining organization by carrier forbidden deduction of dues from wages forbidden. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring

with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization and if any such contract has been enforced prior to the effective date of this Act [enacted May 20, 1926], then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives time place private agreements. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act [45 USCS @ 156].

Eighth. Notices of manner of settlement of disputes posting. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives designation by Mediation Board secret elections. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes

of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth, Violations prosecutions and penalties. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $ 1,000 nor more than $ 20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States [United States attorney] to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations

thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements check-off. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted-

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership,

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft

or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties), uniformly required as a condition of acquiring or retaining membership, Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, first (h) of this act [45 USCS @ 153(h), First division] defining the jurisdictional scope of the first division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the

effective date of the first agreement applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs fourth and fifth of section 2 of this act [this section] in conflict herewith are to the extent of such conflict amended.

HISTORY: (May 20, 1926, ch 347, Title I, @ 2, in part, 44 Stat. 577 June 21, 1934, ch 691, @ 2, in part, 48 Stat. 1186 Apr. 10, 1936, ch 166, 49 Stat. 1189 Jan. 10, 1951, ch 1220, 64 Stat. 1238.)

HISTORY ANCILLARY LAWS AND DIRECTIVES

"This Act", referred to in this section, is Act May 20, 1926, ch 347, 44 Stat. 577, as amended, popularly known as the Railway Labor Act, which appears generally at 45 USCS @@ 151 et seq. For full classification of this Act, consult USCS Tables volumes.

Explanatory notes:

The bracketed words "United States attorney" are inserted in this section on authority of Act June 25, 1948, ch 646, @ 1, 62 Stat. 909, which in essence changed the name of district attorneys to United States attorneys. For explanation, see Prior law and revision note to 28 USCS @ 541.

Amendments:

1934. Act June 21, 1934, substituted "by the carrier or carriers" for "by the carriers" in para. "Second", reworded paras. "Third", "Fourth" and "Fifth" generally, and added paras. "Sixth" to "Tenth".

1951. Act Jan. 10, 1951, added para. "Eleventh".

Redesignation:

This section, enacted as @ 2 of Act May 20, 1926, was redesignated as Title I, @ 152, of such Act by Act Apr. 10, 1936, ch 166, 49 Stat. 1189.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 92–2058

HAWAIIAN AIRLINES, INC.,
PETITIONER
v.
GRANT T. NORRIS

PAUL J. FINAZZO, HOWARD OGDEN, HATSUO HONMA,
PETITIONERS
v.
GRANT T. NORRIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

[June 20, 1994]

JUSTICE BLACKMUN delivered the opinion of the Court.

This case involves the scope of federal pre-emption under the Railway Labor Act (RLA), 45 U. S. C. §151 *et seq.* The RLA, which was extended in 1936 to cover the airline industry, see Act of Apr. 10, 1936, ch. 66, 49 Stat. 1189; 49 U. S. C. §§181–188, sets up a mandatory arbitral mechanism to handle disputes "growing out of grievances or out of the interpretation and application of agreements concerning rates of pay, rules, or working conditions," 45 U. S. C. §153 First (i). The question in this case is whether an aircraft mechanic who claims that he was discharged for refusing to certify the safety of a plane that he

considered unsafe and for reporting his safety concerns to the Federal Aviation Administration may pursue available state law remedies for wrongful discharge, or whether he may seek redress only through the RLA's arbitral mechanism. We hold that the RLA does not pre-empt his state law causes of action.

I

Respondent Grant Norris is an aircraft mechanic licensed by the Federal Aviation Administration (FAA). His aircraft mechanic's license authorizes him to approve an airplane and return it to service after he has made, supervised, or inspected certain repairs performed on that plane. See Certification: Airmen Other Than Flight Crewmembers, 14 CFR §§65.85 and 65.87 (1987). If he were to approve any aircraft on which the repairs did not conform to FAA safety regulations, the FAA could suspend or revoke his license. See Maintenance, Preventive Maintenance, Rebuilding and Alteration, 14 CFR §43.12 (1992).

On February 2, 1987, respondent was hired by petitioner Hawaiian Airlines, Inc. (HAL). Many of the terms of his employment were governed by a collective-bargaining agreement (CBA) negotiated between the carrier and the International Association of Machinists and Aerospace Workers. Under the CBA, respondent's duties included inspecting and repairing all parts of a plane and its engine. On July 15, 1987, during a routine preflight inspection of a DC-9 plane, he noticed that one of the tires was worn. When he removed the wheel, respondent discovered that the axle sleeve, which should have been mirror-smooth, was scarred and grooved. This damaged sleeve could cause the landing gear to fail. Respondent recommended that the sleeve be replaced, but his supervisor ordered that it be sanded and returned to the plane. This was done, and the plane flew as scheduled. At the end of the shift, respondent refused to sign the maintenance record to certify that the repair had been performed satisfactorily and that the airplane was fit to fly. See 14 CFR 43.9(a) (1992). The supervisor immediately suspended him pending a termination hearing. Respondent

immediately went home and called the FAA to report the problem with the sleeve.[1]

Respondent then invoked the grievance procedure outlined in the CBA, and a "Step 1" grievance hearing was held on July 31, 1987. Petitioner HAL accused respondent of insubordination, claiming that his refusal to sign the record violated the CBA's provision that an aircraft mechanic "may be required to sign work records in connection with the work he performs." Respondent relied on the CBA's guarantees that an employee may not be discharged without just cause and may not be disciplined for refusing to perform work that is in violation of health or safety laws. The hearing officer terminated respondent for insubordination.

Still conforming to the CBA procedures, respondent appealed his termination, seeking a "Step 3" grievance hearing. Before this hearing took place, HAL offered to reduce respondent's punishment to suspension without pay, but warned him that "any further instance of failure to perform [his] duties in a responsible manner" could result in discharge. Respondent did not respond to this offer, nor, apparently, did he take further steps to pursue his grievance through the CBA procedures.

On December 18, 1987, respondent filed suit against HAL in Hawaii circuit court. His complaint included two wrongful discharge torts - discharge in violation of the public policy expressed in the Federal Aviation Act and implementing regulations, and discharge in violation of Hawaii's Whistleblower Protection Act, Haw. Rev. Stat. §§378–61 to 378–69 (1988).[2] He

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[1]In response, the FAA initiated a comprehensive investigation, proposed a civil penalty of $964,000 against HAL, proposed the revocation of the license of the supervisor who terminated respondent, and ultimately settled all charges for a substantial fine.

[2]The Hawaii Whistleblower Protection Act forbids an employer to "discharge, threaten, or otherwise discriminate against an employee . . .
because . . . [t]he employee . . . reports or is about to report to a public body . . . a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee

also alleged that HAL had breached the collective-bargaining agreement. HAL removed the action to the United States District Court for the District of Hawaii, which dismissed the breach of contract claim as pre-empted by the RLA, and remanded the other claims to the state trial court. The trial court then dismissed respondent's claim of discharge in violation of public policy, holding that it, too, was pre-empted by the RLA's provision of exclusive arbitral procedures. The state court certified its order as final to permit respondent to take an immediate appeal.

In the meantime, respondent had filed a second lawsuit in state court, naming as defendants three of HAL's officers who allegedly directed, confirmed, or ratified the claimed retaliatory discharge.[3] He again sought relief for, among other things, discharge in violation of public policy and of the Hawaii Whistleblower's Protection Act. The Hawaii trial court dismissed these two counts as pre-empted by the RLA and certified the case for immediate appeal.

The Supreme Court of Hawaii reversed in both cases, concluding that the RLA did not pre-empt respondent's state tort actions. *Norris* v. *Finazzo*, 74 Haw. 235, 842 P. 2d 634 (1992); *Norris* v. *Hawaiian Airlines, Inc.*, 74 Haw. 648, 847 P. 2d 634 (1993). That court concluded that the plain language of §153 First (i) does not support pre-emption of disputes independent of a labor agreement, 74 Haw., at 251, 842 P. 2d, at 642, and interpreted the opinion in *Consolidated Rail Corp.* v. *Railway Labor Executives' Assn.*, 491 U. S. 299 (1989), to limit RLA pre-emption to "disputes involving contractually defined rights." 74 Haw., at 250, 842 P. 2d, at 642. The court rejected petitioners' argument that the retaliatory discharge claims were pre-empted because determining whether HAL discharged respondent for insubordination, and thus for just

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knows that the report is false." §378–62(1). The Act authorizes an employee to file a civil action seeking injunctive relief and actual damages. §378–63(a).

[3]These managerial officers, petitioners here, are Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma.

cause, required construing the CBA. The court pointed to *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U. S. 399 (1988), a case involving § 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U. S. C. §185, in which the Court held that a claim of wrongful termination in retaliation for filing a state worker's compensation claim did not require interpretation of a collective-bargaining agreement, but depended upon purely factual questions concerning the employee's conduct and the employer's motive. Because the same was true in this case, said the Supreme Court of Hawaii, respondent's state tort claims were not pre-empted.

We granted certiorari in these consolidated cases, ___ U. S. ___ (1994).

II

A

Whether federal law pre-empts a state law establishing a cause of action is a question of congressional intent. See *Allis-Chalmers* v. *Lueck*, 471 U. S. 202, 208 (1985). Pre-emption of employment standards "within the traditional police power of the State" "should not be lightly inferred." *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 21 (1987); see also *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 715 (1985) (a federal statute will be read to supersede a State's historic powers only if this is "the clear and manifest purpose of Congress").

Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes. *Atchison, T. & S. F. R. Co.* v. *Buell*, 480 U. S. 557, 562 (1987); see also 45 U. S. C. §151a. To realize this goal, the Act establishes a mandatory arbitral mechanism for "the prompt and orderly settlement" of two classes of disputes. 45 U. S. C. §151a. The first class, those concerning "rates of pay, rules or working conditions," *ibid.*, are deemed "major" disputes. Major disputes relate to " `the formation

of collective bargaining agreements or efforts to secure them.'" *Consolidated Rail Corp.* v. *Railway Labor Executives' Assn.*, 491 U. S. 299, 302 (1989) ("*Conrail*"), quoting *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 723 (1945). The second class of disputes, known as "minor" disputes, "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U. S. C. §151a. Minor disputes "involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30, 33 (1957). Thus, "major disputes seek to create contractual rights, minor disputes to enforce them." *Conrail*, 491 U. S., at 302, citing *Burley*, 325 U. S., at 723.

Petitioners contend that the conflict over respondent's firing is a minor dispute. If so, it must be resolved only through the RLA mechanisms, including the carrier's internal dispute-resolution processes and an adjustment board established by the employer and the unions. See 45 U. S. C. §184; *Buell*, 480 U. S., at 563; *Conrail*, 491 U. S., at 302. Thus, a determination that respondent's complaints constitute a minor dispute would pre-empt his state law actions.

B

The Court's inquiry into the scope of minor disputes begins, of course, with the text of the statute. Petitioners point out that the statute defines minor disputes to include "disputes growing out of grievances *or* out of the interpretation or application of [CBAs]." Petitioners argue that this disjunctive language must indicate that "grievances" means something other than labor-contract disputes, else the term "grievances" would be superfluous. Accordingly, petitioners suggest that "grievances" should be read to mean all employment-related disputes, including those based on statutory or common law. Even if we were persuaded that the word "or" carried this weight, but cf. *United States* v. *Olano*, ___ U. S. ___ (1993) (slip op. 6–7) (reading "error or defect" to create one

category of "error"), citing *United States* v. *Young*, 470 U. S. 1, 15, n. 12 (1985); *McNally* v. *United States*, 483 U. S. 350, 358–359 (1987) (second phrase in disjunctive added simply to make the meaning of the first phrase "unmistakable"), petitioners' interpretation produces an overlap not unlike the one it purports to avoid. Their expansive definition of "grievances" necessarily encompasses disputes growing out of "the interpretation or application" of CBAs. Thus, in attempting to save the term "grievances" from superfluity, petitioners would make the phrase after the "or" mere surplusage.

We think it more likely that "grievances," like disputes over "the interpretation or application" of CBAs, refers to disagreements over how to give effect to the bargained-for agreement. The use of "grievance" to refer to a claim arising out of a CBA is common in the labor-law context in general, see, *e.g.*, *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U. S. 29, 36 (1987), and it has been understood in this way in the RLA context. See H.R. Rep. No. 1944, 73d Cong., 2d Sess., 2–3 (1934) (referring to RLA settlement of "minor disputes known as `grievances,' which develop from the interpretation and/or application of the contracts between the labor unions and the carriers"). Significantly, the adjustment boards charged with administration of the minor-dispute provisions have understood these provisions as pertaining only to disputes invoking contract-based rights. See, *e.g.*, NRAB Fourth Div. Award No. 4548 (1987) (function of the National Rail Adjustment Board is to decide disputes in accordance with the controlling CBA); NRAB Third Div. Award No. 24348 (1983) (issues not related to the interpretation or application of contracts are outside the Board's authority); NRAB Third Div. Award No. 19790 (1973) ("this Board lacks jurisdiction to enforce rights created by State or Federal Statutes and is limited to questions arising out of interpretations and application of Railway Labor Agreement"); *Northwest Airlines/Airline Pilots Assn., Int'l System Bd. of Adjustment*, Decision of June 28, 1972, p. 13 ("both the traditional role of the

arbitrator and admonitions of the courts require the Board to refrain from attempting to construe any of the provisions of the [RLA]"); *United Airlines, Inc.*, 48 LA 727, 733 (BNA) (1967) ("The jurisdiction of this System Board does not extend to interpreting and applying the Civil Rights Act").

Accordingly, we believe that the most natural reading of the term "grievances" in this context is as a synonym for disputes involving the application or interpretation of a CBA. See Webster's Third New International Dictionary 1585 (1986) (the word "or" may be used to indicate "the synonymous, equivalent, or substitutive character of two words or phrases"). Nothing in the legislative history of the RLA[4] or other sections of the statute undermines this conclusion. But even accepting that §151(a) is susceptible of more than one interpretation, no proposed interpretation demonstrates a clear and manifest congressional purpose to create a

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[4]During the debates surrounding the RLA's enactment in 1926, floor statements that, in isolation, could support a broader interpretation of "grievances" were counterbalanced by other statements—some even by the same legislators—that equated grievances with contract interpretation. Compare 67 Cong. Rec. 4517, 8807 (1926), with *id.*, at 4510, 8808. This inconclusive debate hardly calls for fashioning a broad rule of pre-emption. Moreover, in 1934 when Congress amended the RLA to make arbitration mandatory for minor disputes, the accompanying House Report stated that the bill was intended "to provide sufficient and effective means for the settlement of minor disputes known as `grievances,' which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions." H.R. Rep. No. 1944, 73d Cong., 2d Sess., 2–3 (1934).

[5]Petitioners cite the statute's reference to the parties' general duties as including "settl[ing] all disputes, whether arising out of the application of [collective bargaining] agreements or otherwise." 45 U. S. C. §152 First. This provision, which is phrased more broadly than the operative language of §153 First (i), does not clearly refer only to minor disputes. But even if this provision is read to require parties to try to settle certain issues arising out of the employment relationship but not specifically addressed by the CBA, this does not compel the conclusion that all issues touching on the employment relationship must be resolved through arbitration or that all claims involving rights and duties that exist independent of the CBA are thereby pre-empted. Our precedents squarely reject this pervasive pre-emption.

regime that broadly pre-empts substantive protections extended by the States, independent of any negotiated labor agreement.

C

Our case law confirms that the category of minor disputes contemplated by §151(a) are those that are grounded in the collective-bargaining agreement. We have defined minor disputes as those involving the interpretation or application of existing labor agreements. See, *e.g.*, *Consolidated Rail Corp.* v. *Railway Labor Exec. Assn.*, 491 U. S. 299, 305 (1989) ("The distinguishing feature of [a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [CBA]"); *Pittsburgh & Lake Erie R. Co.* v. *Railway Labor Executives' Assn.*, 491 U. S. 490, 496, n. 12 (1989) ("Minor disputes are those involving the interpretation or application of existing contracts"); *Brotherhood of R.R. Trainmen*, 353 U. S., at 33 (minor disputes are "controversies over the meaning of an existing collective bargaining agreement"); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 243 (1950) (RLA arbitral mechanism is meant to provide remedies for "adjustment of railroad-employee disputes growing out of the interpretation of existing agreements").

Moreover, we have held that the RLA's mechanism for resolving minor disputes does not pre-empt causes of action to enforce rights that are independent of the CBA. More than 60 years ago, the Court rejected a railroad's argument that the existence of the RLA arbitration scheme pre-empted a state statute regulating the number of workers required to operate certain equipment. *Missouri Pacific R. Co. v. Norwood*, 283 U. S. 249, 258 (1931) ("No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas statutes under consideration"). Not long thereafter, the Court rejected a claim that the RLA pre-empted an order by the Illinois Commerce Commission requiring cabooses on all trains; the operative collective-bargaining agreement required cabooses only on some of the trains. *Terminal Railroad Assn. of St. Louis v.*

Brotherhood of Railroad Trainmen, 318 U. S. 1 (1943). Although the Court assumed that a railroad adjustment board would have jurisdiction under the RLA over this dispute, *id.*, at 6, it concluded that the state law was enforceable nonetheless:

> "State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by work[ers] for better protection and upon refusal might, we suppose, be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. . . . But it cannot be said that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the [RLA] was not a preëmption of the field of regulating working conditions themselves . . . ." *Id.*, at 6–7.

Thus, under *Norwood*, substantive protections provided by state law, independent of whatever labor agreement might govern, are not pre-empted under the RLA.

Although *Norwood* and *Terminal Railroad* involved state workplace safety laws, the Court has taken a consistent approach in the context of state actions for wrongful discharge. In *Andrews v. Louisville & N. R. Co.*, 406 U. S. 320 (1972), the Court held that a state law claim of wrongful termination was pre-empted, *not* because the RLA broadly pre-empts state law claims based on discharge or discipline, but because the employee's claim was firmly rooted in a breach of the CBA itself. He asserted no right independent of that agreement:

> "Here it is conceded by all that the *only source* of [Andrews'] right not to be discharged, and therefore to treat an alleged discharge as a "wrongful" one that entitled him to damages, is the [CBA]. . . . [T]he disagreement turns on the extent of

> [the railroad's] obligation to restore [Andrews] to his regular duties following injury in an automobile accident. The existence and extent of such an obligation in a case such as this will depend on the interpretation of the [CBA]. Thus, [Andrews'] claim, and the [railroad's] disallowance of it, stem from differing interpretations of the [CBA]. . . . His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment." *Id.*, at 324 (emphasis added).

Here, in contrast, the CBA is not the "only source" of respondent's right not to be discharged wrongfully. In fact, the "only source" of the right respondent asserts in this action is state tort law. Wholly apart from any provision of the CBA, petitioners had a state-law obligation not to fire respondent in violation of public policy or in retaliation for whistleblowing. The parties' obligation under the RLA to arbitrate disputes arising out of the application or interpretation of the CBA did not relieve petitioners of this duty.

Atchison, T. & S. F. R. Co. v. *Buell*, 480 U. S. 557 (1987), confirms that "minor disputes" subject to RLA arbitration are those that involve duties and rights created or defined by the collective-bargaining agreement. In *Buell*, a railroad employee sought damages for workplace injuries under the Federal Employers' Liability Act (FELA), 45 U. S. C. §51 *et seq.*, which provides a remedy for a railroad worker injured through an employer's or coworker's negligence. The railroad argued that, because the alleged injury resulted from conduct that was subject to the collective-bargaining agreement, the employee's sole remedy was through RLA arbitration. The Court unanimously rejected this argument, emphasizing that the rights derived from the FELA were independent of the CBA:

> "The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages. . . . The FELA not only provides railroad workers with substantive

> protection against negligent conduct that is independent of the employer's obligations under its collective-bargaining agreement, but also affords injured workers a remedy suited to their needs, unlike the limited relief that seems to be available through the Adjustment Board. It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion." 480 U. S., at 564–565.

It likened *Buell* to other cases in which the Court had concluded that "notwithstanding the strong policies encouraging arbitration, `different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers,'" *id.*, at 565, quoting *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 737 (1981), and distinguished it from *Andrews*, which involved a state wrongful-discharge claim "based squarely" on an alleged breach of a CBA, 480 U. S., at 566.[6]

D

The pre-emption standard that emerges from the line of cases leading to *Buell*—that a state-law cause of action is not pre-empted by the RLA if it involves rights and obligations that exist independent of the collective-bargaining agreement—is virtually

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[6]*Buell*, of course, involved possible RLA preclusion of a cause of action arising out of a *federal* statute, while this case involves RLA preemption of a cause of action arising out of *state* law and existing entirely independent of the collective bargaining agreement. That distinction does not rob *Buell* of its force in this context. See *Lingle* v. *Norge Div. of Magic Chef*, 486 U. S. 399, 412 (1988) (*Buell* principles applicable to determine whether federal labor law pre-empts a state statute). Principles of federalism demand no less caution in finding that a federal statute pre-empts state law. See *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S., at 21 (pre-emption of state statute "should not be lightly inferred in this [labor] area, since the establishment of labor standards falls within the traditional police powers of the State").

identical to the pre-emption standard the Court employs in cases involving §301 of the LMRA, 29 U. S. C. §185.[7] In *Allis-Chalmers* v. *Lueck*, 471 U. S. 202 (1985), the Court applied §301 pre-emption to a state-law claim for bad-faith handling of a worker's compensation claim because the duties the employer owed the employee, including the duty of good faith, were rooted firmly in the collective-bargaining agreement. Its pre-emption finding was based on the fact that "the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, [so that] any attempt to assess liability here inevitably will involve contract interpretation." *Id.*, at 218.

It cautioned, however, that other state-law rights, those that existed independent of the contract, would not be similarly pre-empted:

> "Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by §301 or other provisions of the federal labor law. . . . Nor is there any suggestion that Congress, in adopting §301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. . . . Clearly, §301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the preemptive effect of §301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Id.*, at 211–212.[8]

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[7]Section 301(a) provides federal-court jurisdiction over controversies involving collective-bargaining agreements and "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 451 (1957).

[8]The Court applies these principles in *Livadas* v. *Aubry*, *ante*, at ___, in which we reject the claim that an employee's state-law right to receive a penalty payment from

In a case remarkably similar to the case before us now, this Court made clear that the existence of a potential CBA-based remedy did not deprive an employee of independent remedies available under state law. In *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U. S. 399 (1988), an employee covered by a labor agreement was fired for filing an allegedly false worker's compensation claim. After filing a grievance pursuant to her collective-bargaining agreement, which protected employees against discharge except for "proper" or "just" cause, she filed a complaint in state court, alleging that she had been discharged for exercising her rights under Illinois worker's compensation laws. The state court had held her state-law claim pre-empted because "the same analysis of the facts" was required in both the grievance proceeding and the state-court action. This Court reversed.

It recognized that where the resolution of a state-law claim depends on an interpretation of the collective-bargaining agreement, the claim is pre-empted. *Id.*, at 405–406, citing *Lueck*, *supra*; *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962). It observed, however, that "purely factual questions" about an employee's conduct or an employer's conduct and motives do not "requir[e] a court to interpret any term of a collective-bargaining agreement." *Id.*, at 407. The state-law retaliatory discharge claim turned on just this sort of purely factual question: whether the employee was discharged or threatened with discharge, and, if so, whether the employer's motive in discharging him was to deter or interfere with his exercise of rights under Illinois worker's compensation law.

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her employer was pre-empted under §301 because the penalty was pegged to her wages, which were determined by the governing CBA. The Court states that "when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Ante*, at ___, citing *Lingle* v. *Norge Division of Magic Chef*, 486 U. S. 399, 413, n. 12 (1988). In addition, it reaffirms that "§301 cannot be read broadly to pre-empt non-negotiable rights conferred on individual employees as as matter of state law." *Ante*, at ___.

While recognizing that "the state-law analysis might well involve attention to the same factual considerations as the contractual determination whether Lingle was fired for just cause," *id.*, at 408, the Court disagreed that

> "such parallelism render[ed] the state-law analysis dependent upon the contractual analysis. For while there may be instances in which the National Labor Relations Act pre-empts state law on the basis of the subject matter of the law in question, §301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is `independent' of the agreement for §301 pre-emption purposes." *Id.*, at 408–409.

The Court's ruling in *Lingle* that the LMRA pre-empts state law only if a state-law claim is dependent on the interpretation of a collective-bargaining agreement is fully consistent with the holding in *Buell*, 480 U. S., at 564–565, that the RLA does not pre-empt "substantive protections . . . independent of the [CBA]," with the holding in *Terminal Railroad*, 318 U. S., at 7, that the RLA does not pre-empt basic "protections . . . laid down by state authority," with the conclusion in *Andrews*, 406 U. S., at 324, that a state-law claim is pre-empted where it "depend[s] on the interpretation" of the CBA, and with the description in *Conrail*, 491 U. S., at 305, of a minor dispute as one that can be "conclusively resolved" by reference to an existing collective-bargaining agreement. *Lingle*, in fact, expressly relied on *Buell*, see 486 U. S., at 411–412, just as earlier RLA cases have drawn analogies to LMRA principles,

see, *e.g.*, *International Assn. of Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682, 692 (1963). Given this convergence in the pre-emption standards under the two statutes, we conclude that *Lingle* provides an appropriate frame-work for addressing pre-emption under the RLA, andwe adopt the *Lingle* standard to resolve claims of RLA pre-emption.[9]

E

In reaching this conclusion, we reject petitioners' suggestion that this contract-dependent standard for minor disputes is inconsistent with two of our prior cases, *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711 (1945), and *Consolidated Rail Corp.* v. *Railway Labor Exec. Assn.*, 491 U. S. 299, 302 (1989). *Burley* was not a pre-emption case. Rather, it concerned the authority of union officials to settle railroad workers' individual claims for damages for alleged violations of the collective-bargaining agreement. The railroad urged that the union representative, who had the authority to negotiate collective agreements in major disputes, enjoyed similar

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[9]It is true, as petitioners observe, that the RLA and the LMRA are not identical in language, history, and purpose. The LMRA, unlike the RLA, does not mandate arbitration, nor does it prescribe the types of disputes to be submitted to arbitration under bargaining agreements. Nonetheless, the common purposes of the two statutes, the parallel development of RLA and LMRA pre-emption law, see, *e.g.*, *International Assn. of Machinists* v. *Central Airlines*, 372 U. S. 682, 691–692 (1963); *Allis-Chalmers* v. *Lueck*, 471 U. S. 202, 210 (1985), and the desirability of having a uniform common law of labor law pre-emption, cf. *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 383–384 (1969), support the application of the *Lingle* standard in RLA cases as well.

Lower courts, too, have recognized the appropriateness of the *Lingle* standard to RLA pre-emption analysis. See, *e.g.*, *Anderson* v. *American Airlines, Inc.*, 2 F. 3d 590, 595 (CA5 1993) (applying *Lingle* to analyze RLA pre-emption); *Davies* v. *American Airlines, Inc.*, 971 F. 2d 463, 466–467 (CA10 1992) (same), cert. denied, ___ U. S. ___ (1993); *O'Brien* v. *Consolidated Rail Corp.*, 972 F. 2d 1, 4 (CA1 1992) (same), cert. denied, ___ U. S. ___ (1993); *Maher* v. *New Jersey Transit Rail Operations, Inc.*, 125 N.J. 455, 472–473, 593 A. 2d 750, 758 (1991) (same). But see, *e.g.*, *Hubbard* v. *United Airlines, Inc.*, 927 F. 2d 1094, 1097 (CA9 1991) (*Lingle* does not govern in RLA cases); *Lorenz* v. *CSX Transp., Inc.*, 980 F. 2d 263, 268 (CA4 1992) (same).

authority to settle individual claims in minor disputes. In the course of rejecting this claim, the Court described minor disputes as including the "omitted case," that is, one "founded upon some incident of the employment relationship, or asserted one, independent of those covered by the collective bargaining agreement, *e.g.*, claims on account of personal injury." 325 U. S., at 723.

This language is sweeping, but its effect is limited. The conflict in *Burley*, which the parties agreed was a minor dispute, concerned the terms of a collective-bargaining agreement, and not some other "incident of the employment relationship," or any "omitted case." These references, therefore, are dicta. Moreover, even the "omitted case" dictum logically can refer to a norm that the parties have created but have omitted from the collective-bargaining agreement's *explicit* language, rather than to a norm established by a legislature or a court.[10] Finally, *Burley*'s one specific example of an "omitted case"—claims for personal injury that do not depend on the contract—was found in *Buell* to be outside the RLA's exclusive jurisdiction. Nonetheless, to avoid any confusion, we expressly disavow any language in *Burley* suggesting that minor disputes encompass state-law claims that exist independent of the collective-bargaining agreement.

Conrail, like *Burley*, involved no pre-emption analysis. The parties agreed that the dispute—a workers' challenge to the railroad's drug testing policies—was governed by the RLA, because Conrail's policy of conducting physical examinations was an implied term of the collective-bargaining agreement. 491 U. S., at

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[10]See *Detroit & Toledo Shore Line R. Co.* v. *United Transportation Union*, 396 U. S. 142, 154–155 (1969) ("Where a condition is satisfactorily tolerable to both sides, it is often *omitted* from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others") (emphasis added); *Conrail*, 491 U. S., at 311–312 (recognizing that CBAs include implied terms arising from "practice, usage and custom"); see also *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578–579 (1960) (a CBA is "more than a contract; it is a generalized code to govern a myriad of cases which the draft[ers] cannot wholly anticipate").

301. The only question before the Court was whether the employer's drug-testing policy constituted an attempt to add a new term to the existing agreement, making it a major dispute subject to a "protracted process" of bargaining and mediation, *id.*, at 303, or whether the testing reflected the employer's interpretation and application of an implied term of the existing contract, producing a minor dispute subject to a less onerous process of arbitration. We concluded that the dispute was minor, stating that "[t]he distinguishing feature of [a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [CBA]." *Id.*, at 305, citing Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L. J. 567, 568, 576 (1937). Obviously, to say that a minor dispute can be "conclusively resolved" by interpreting the CBA is another way of saying that the dispute does not involve rights that exist independent of the CBA.

Petitioners, however, pin their hopes on the observation that "[w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is *arguably justified* by the terms of the parties' collective-bargaining agreement." *Id.*, at 307 (emphasis added). They argue that this case involves a minor dispute because the termination of respondent was "arguably justified" by the CBA's provision permitting termination for "just cause." This "arguably justified" standard, however, was employed only for policing the line between major and minor disputes. Recognizing that accepting a party's characterization of a dispute as "minor" ran the risk of undercutting the RLA's prohibition "against unilateral imposition of new contractual terms," *id.*, at 306, the Court held that a dispute would be deemed minor only if there was a sincere, nonfrivolous argument that it turned on the application of the existing agreement, that is, if it was "arguably justified" by that agreement. Obviously, this test said nothing about the threshold question whether the dispute was subject to the RLA in the first place.

III

Returning to the case before us, the question under *Lingle* is whether respondent's state-law wrongful discharge claims are independent of the collective- bargaining agreement. Petitioners argue that resort to the agreement is necessary to determine whether respondent, in fact, was discharged. This argument is foreclosed by *Lingle* itself. *Lingle* teaches that the issue to be decided in this case—whether the employer's actions make out the element of discharge under Hawaii law—is a "purely factual question." 486 U. S., at 407.

Nor are we persuaded by petitioners' contention that the state tort claims require a determination whether the discharge, if any, was justified by respondent's failure to sign the maintenance record, as the agreement required him to do. Although such a determination would be required with regard to respondent's separate allegation of discharge in violation of the agreement, the District Court dismissed that count as pre-empted by the RLA, and respondent does not challenge that dismissal. The state tort claims, by contrast, require only the purely factual inquiry into any retaliatory motive of the employer.

Accordingly, we agree with the Supreme Court of Hawaii that respondent's claims for discharge in violation of public policy and in violation of the Hawaii Whistleblower Protection Act are not pre-empted by the RLA, and we affirm that court's judgment.

It is so ordered.

Accordingly, we agree with the Supreme Court of Hawaii that respondent's claims for discharge in violation of public policy and in violation of the Hawaii Whistleblower Protection Act are not pre-empted by the RLA, and we affirm that court's judgment.

It is so ordered.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-0112-CIV-DAVIS

BRUCE RICHARD TOSKI,
Plaintiff,

vs. REPORT and RECOMMENDATION

WILLIAM J. MCDONNELL,
JEFF HENRY, and KEN
WILLIAMS,
Defendants.
_____/

This Cause is before the undersigned upon an order of reference by United States District Judge Edward B. Davis. Presently pending before the Court is Defendants' Motion for Summary Judgment (D.E. 97). Plaintiff has filed a response (D.E. 162)[1] and Defendants have replied (undocketed) .

FACTUAL AND PROCEDURAL BACKGROUND

[1] On October 6, 1993 Judge Davis denied Plaintiff's motion to file a response brief in excess of ten pages (D.E. 158). Nevertheless, Plaintiff's brief, while reaching exactly ten pages, is printed in a typeface so small that it strains the eye to read. This creative word processing violates the spirit, if not the letter, of both the Local Rules and Judge Davis's order. Much as this Court is inclined to strike the excess portion of Plaintiff's pleading, because of the interminable delays encountered in this case the undersigned has instead read and considered it in its minuscule entirety. Plaintiff is warned that his status as a non-attorney does not give him carte blanche to disobey court orders and that such actions in the future shall not be excused.

Plaintiff brings this action alleging a wide variety of misconduct on the part of Defendants, his former supervisors at the late Eastern Air Lines [EAL] . Plaintiff was hired by EAL as a shop laborer at the Miami airport beginning in June, 1976. Plaintiff remained in EAL's employ (except for a leave of absence between August and November of 1983) until November 7, 1986 when he was dismissed. During his employment at EAL Plaintiff worked both as a stock clerk and as a mechanic. At his termination, and at the time of all the alleged wrongful acts, Plaintiff was working as a mechanic in the Ground Support Equipment Auto Shop where EAL's airport vehicles were repaired and maintained.

Each of the Defendants, at various times, supervised Plaintiff's work at EAL. Plaintiff's complaint names Defendant McDonnell as his "supervisor," Defendant Henry as his "foreman" and later as "general foreman," and Defendant Williams as his "manager."

A full recitation of the allegations detailed in Plaintiff's complaint is unnecessary for the resolution of the instant motion. Generally, however, the complaint involves a series of disciplinary actions by various of Plaintiff's supervisors beginning in 1984 and ending in Plaintiff's eventual dismissal. These disciplinary actions concern Plaintiff's job performance and certain actions deemed by his supervisors to be in violation of EAL policy and procedure.[2]

In summary, Plaintiff was accused of performing unnecessary and unauthorized work and of disobeying directives from his supervisors. In the most colorful incident, Plaintiff was asked, and refused, to remove a button from his uniform which stated "Frank is a weenie." Plaintiff later commandeered a microphone in the shop office and yelled "Frank is a weenie" over the public address system.[3] Plaintiff also alleges that Defendant McDonnell, on two occasions, physically assaulted Plaintiff.

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[2] These actions are detailed in memos attached to the complaint and Defendants' motion.

[3] The "Frank" referred to is presumably Frank Lorenzo who was, at the time of these incidents, running EAL.

Plaintiff's original complaint contained nine counts. Count VIII was dismissed by Judge Davis on November 18, 1991. See Order of Judge Davis (D.E. 21) . Also dismissed in that order was that part of Count I involving the April 11, 1986 assault because the statute of limitations had run as to the alleged incident. See Report and Recommendation of Magistrate Judge Turnoff (D.E. 20).[4] Therefore, the Complaint now contains the following eight counts:

Count I:	Battery (Defendant McDonnell) (October 24, 1986 incident only);
Count II:	Negligent Retention (Defendants Henry and Williams);
Count III:	Wrongful Discharge (Defendant Williams);
Count IV:	Negligence Per Se Unfair Labor Practice - Railway Labor Act (all defendants);
Count V:	Breach of Implied Covenant of Good Faith and Fair Dealing (all defendants);
Count VI:	Breach of Contract (all defendants);
Count VII:	Failure to Protect Evidence (all defendants);
Count IX:	Conspiracy (all defendants).

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[4] Defendants state in their motion that Count I was dismissed. This is a misstatement of Judge Davis's order which merely ratified the Report and Recommendation issued by the undersigned. That Report recommended dismissal only as outlined above, not of the entire count. Any other reading of Judge Davis's order is erroneous. Therefore, Count I as it involves the later alleged incident is still a viable claim.

ANALYSIS

I. Railway Labor Act

A. Statute of Limitations

Defendants first argue that Plaintiff's claims under the Railway Labor Act [RLA] are time-barred. In Count IV, Plaintiff alleges several violations of the Railway Labor Act: 1) failing to "make and maintain" the collective bargaining agreement; 2) failing to settle disputes in an expeditious manner; 3) refusing to allow Plaintiff access to shop employees after his termination; and 4) attempting to coerce and influence shop mechanics prior to Plaintiff's election as shop steward.

Although the RLA does not contain a specific statute of limitations, courts applying facts similar to the case at bar, and guided by the Supreme Court's decision in Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), have "borrowed" the six-month limitations period found in § 10(b) of the National Labor Relations Act. 29 U.S.C. § 160(b) . *See, e.g.,* Robinson v. Pan American World Airways, Inc., 777 F.2d 84 (2d Cir. 1985); Brock v. Republic Airlines, Inc., 776 F.2d 523 (5th Cir. 1985). If the six-month limitations period is applied, each of Plaintiff's claims under the RLA are time-barred as they indisputably arose more than six-months prior to the bringing of this suit.

The parties have not cited, and the undersigned is unaware of, any cases directly on point in this Circuit. Although the undersigned finds Defendants' arguments persuasive, this issue need not be resolved at this time. As will be discussed below, Plaintiff's failure to exhaust his remedies under the collective bargaining agreement in effect at his termination operates to bar his entire suit.

B. Failure to Exhaust Administrative Remedies

Defendants next argue that summary judgment is mandated as to Plaintiff's claims under the RLA because he has failed to exhaust the

administrative remedies provided under the collective bargaining agreement in effect at Plaintiff's termination.

All parties agree that Plaintiff was subject to the collective bargaining agreement in effect between the union and EAL. This agreement contained procedures to be followed in the event of a dispute and Plaintiff has demonstrated that he was familiar with and, on previous occasions, availed himself of these procedures. *See* Toski Deposition at 172 3, 383. Furthermore, Plaintiff concedes that he filed a grievance in relation to the acts alleged in this suit, but that he voluntarily abandoned his grievance for strategic reasons. Id. at 510-11, 5155.[5] Defendants cite this failure as case-dispositive and urge summary judgment in their favor.

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[5] At his deposition Plaintiff testified that he filed a grievance as to his discharge on November 12, 1986. He stated that no hearing was ever held on his termination grievance because he was instead pursuing an appeal from an arbitrators' decision on another grievance related to the individual letters issued prior to his discharge. Plaintiff stated that this appeal was still pending at the time EAL filed for bankruptcy. Plaintiff testified as follows:

Q: So you made a strategy decision to have the System Board of Adjustment consider you grievances on the individual letters before they considered your grievance [relating to termination], correct?

A: Exactly.

Q: And it was during the course of your appeal from the System Board of Adjustment's ruling on those earlier grievances that Eastern Air Lines filed bankruptcy?

A: Yes.

Q: Was there anything in the grievance procedure which prevented you from having the System Board of Adjustment consider the [termination] grievance at the same time that it considered the other grievances?

A: I don't believe so.

Plaintiff argues in response that he did not abandon his grievance, but that the procedure was "rendered moot" by EAL's eventual bankruptcy.[6] This argument, however, is unconvincing in light of the two years and four months between Plaintiff's filing of the termination grievance (November 12, 1986) and the date on which EAL declared bankruptcy (March 9, 1989) particularly given. Plaintiff's own admission that nothing prevented him from pursuing his grievance and his arbitration appeal simultaneously. Id.

The undersigned agrees with Defendants that Plaintiff failed to pursue the grievance procedure outlined by the collective bargaining agreement. This failure to exhaust the administrative remedies available to him prevents him from prevailing in this forum. The RLA promotes stability in labor-management relations by providing effective and efficient remedies for labor disputes, thereby protecting the transportation industry from disruption. Union P. R. Co. v. Sheehan, 439 U.S. 89 (1978). Disputes between employees and carriers arising "out of interpretation orapplication of the collective bargaining agreement [are] commonly referred to as 'minor disputes.'" Kaschak v. Consolidated Rail Corp., 707 F.2d 902, 904 (6th Cir. 1983).

When a minor dispute arises, the RLA provides initially for settlement through the contractually agreed upon grievance procedures. 45 U.S.C. ~ 152 First. The Supreme Court has held that adjustment boards have primary and exclusive jurisdiction over minor disputes. Sheehan, 439 U.S. at 93-94. A party's claims of futility in following the procedure outlined by the collective bargaining agreement are insufficient to avoid this jurisdictional rule. Le Boutillier v. Air Line Pilots Association International, 778 F.2d 883 (D.C. Cir. 1985). Thus, Plaintiff's claims under the RLA and the collective bargaining agreement (Counts IV and VI) are barred by his failure to proceed with the grievance he filed at his termination.

II. State common law claims

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[6] Plaintiff's assertion that exhaustion is not required is rejected. The cases cited are questionable at best and are nevertheless distinguished on their facts.

Plaintiff's remaining claims are all brought pursuant to state law. Defendants contend that RLA preemption, coupled with Plaintiff's failure to exhaust his administrative remedies, entitles them to summary judgment on each of these separate claims as well. Plaintiff's only response to this argument is that he did not fail to exhaust, which argument has now been rejected.

In passing the RLA, as noted above, Congress intended to minimize potential disruption to the transportation industry caused by labor disputes. This goal is accomplished by establishing arbitration procedures rather than allowing disputes to be brought initially to the courts. The arbitration provisions are mandatory, and preempt state remedies. Andrews v. Louisville & N.R. Co., 406 U.S. 320 (1972). Accordingly, it has been held that any complaint "based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the RLA" should be dismissed on grounds of preemption. Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369 (9th Cir.) cert. *denied*, 439 U.S. 930 (1978). The undersigned finds that the claims alleged by Plaintiff meet this test and are, therefore, preempted.

In the words of one Georgia District Court which considered the same issue, RLA preemption "does not appear to be one which has been frequently dealt with" by courts in the Eleventh Circuit. Fox v. Southern R. Co., 764 F. Supp. 644 (N.D. Ga. 1991). Nevertheless, instruction can be drawn from courts in other jurisdictions which have considered cases involving facts similar to those presented by the instant case.

In Fox, the court concluded that the plaintiff's libel claim was preempted by the RLA because the allegedly libelous letter was issued as part of the process mandated by the collective bargaining agreement. Id. at 650. Other courts have come to similar decisions for a wide variety of disputes which are, in varying degrees, related to the procedures under collective bargaining agreements. *See, e.g.*, Carson v. Southern Railway Co. 494 F. Supp. 1104 (D.S.C. 1979) (defamation action dismissed because claim fell within sole jurisdiction of adjustment board and "plaintiff is without an independent judicial remedy."); Majors v. U.S. Air, Inc. 525 F. Supp. 853 (D. Md. 1981) (false imprisonment and defamation claims

dismissed as preempted by RLA) ; Barchers v. Missouri P. R. Co. 669 S.W.2d 235 (Mo. Ct. App. 1984) (libel claims relating to letter submitted during investigation dismissed as preempted by RLA) .

Furthermore, it is clear that the claims alleged need not be directly related to the collective bargaining agreement process in order to be preempted. n Majors, for example, the court held tortious conduct committed in the course of a company investigation to be preempted stating: "[s]o long as his claim is founded on some incident of the employment relation, it is immaterial, for purposes of coverage by the Railway Labor Act, whether the claim is expressly covered by the collective bargaining agreement, or is independent of that agreement." Majors, 525 F. Supp. at 857.

Plaintiff's complaint alleges various state law causes of action. It is clear from the facts alleged, that Plaintiff's claims are all related to the letters of reprimand, Plaintiff's interactions with his supervisors, and his eventual dismissal from his job. Each of plaintiff's state law claims arises out of the employment relationship and each is "based on a matrix of facts which are inextricably intertwined" with the procedures of the collective bargaining agreement and the RLA. As such, these claims are preempted by the RLA and Defendants are entitled to summary judgment as a matter of law.[7]

RECOMMENDATION

Therefore, based on the foregoing, it is the RECOMMENDATION of the undersigned that Defendants' Motion for Summary Judgment (D.E. 162) be GRANTED.

Pursuant to 28 U.S.C. §636(b)(1)(B) and (C), the parties may serve and file written objections with the Honorable Edward B. Davis, United States District Judge, within ten (10) days after being served with a copy of

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[7] Therefore, it is unnecessary to address the separate arguments promoted by Defendants in favor of summary judgment on the separate state law claims.

this Report and Recommendation. See Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982). RESPECTFULLY RECOMMENDED, in Chambers, at Miami, Florida, this 9th day of November, 1993.

William C. Turnoff
United States Magistrate Judge

CC:
Honorable Edward B. Davis
Bruce Richard Toski, *pro se*
Donald Blackwell, Esquire

Supreme Court, U.S.
FILED
OCT 6 1997
CLERK

(2)

No. 97-217

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

BRUCE RICHARD TOSKI,

Petitioner,

v.

WILLIAM J. MCDONNELL,
JEFFERSON H. HENRY and
KENDALL G. WILLIAMS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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20 pp

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW[1]

Bruce Richard Toski – Plaintiff/Appellant/Petitioner

William J. McDonnell – Defendant/Appellee/Respondent

Jefferson H. Henry – Defendant/Appellee/Respondent

Kendall G. Williams – Defendant/Appellee/Respondent

---

[1] Hereinafter, all references to the parties will be abbreviated as follows: BRUCE RICHARD TOSKI ("Petitioner" or "TOSKI"); WILLIAM J. McDONNELL ("McDONNELL"), JEFFERSON H. HENRY ("HENRY"); and KENDALL G. WILLIAMS ("WILLIAMS") (collectively "Respondents").

TABLE OF CONTENTS

Parties To The Proceedings In The Court Below i

Table of Authorities iii

Official and Unofficial Reports And Opinions Delivered In The Case. vi

Jurisdictional Statement 1

Statement Of The Case 1

Statement of Facts 1

Statement of Proceedings 2

Reasons For Denying The Writ 5

I. This Court Should Not Grant A Writ Of Certiorari To Consider An Issue Which The Petitioner Did Not Properly Preserve, Where Three Federal Courts Already Have Reviewed Petitioner's Claims And, At Various Times, Concluded That They Are "Meritless" And That Petitioner's Appeal Is Frivolous 5

II. The Grant Of A Writ Of Certioari Would Be Futile Because The Preemption Issue, Which Is The Sole Basis For Petitioner's Appeal, Is Only One Of A Number Of Independent Grounds, Which, Individually And Collectively, Are Sufficient To Support The Decisions Of The District Court And The Court Of Appeals 10

Conclusion 13

TABLE OF AUTHORITIES

Page

Cases:

Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) 9

Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) 9

Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978) 9

Auer v. Robbins, ___ U.S. ___, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) 9

Bennett v. Spear, ___ U.S. ___, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) 10

Connor v. Finch, 431 U.S. 407, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977) 9

Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977) 11

Delta Air Lines, Inc. v. August, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981) 8

Dothard v. Rawlinson, 438 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) 9

Duignan v. United States, 274 U.S. 195, 47 S.Ct. 566, 71 L.Ed. 996 (1927) 6

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) 10, 12

Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994) 7

Cases, continued:

Page

Hoover v. Ronwin, 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590, *reh'g denied*, 467 U.S. 1268, 104 S.Ct. 3564, 82 L.Ed.2d 865 (1984) 8

Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976) 9

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 60 S.Ct. 670, 84 L.Ed. 849 (1940) 6, 12

Mills v. Singletary, 63 F.3d 999, *reh'g, en banc, denied*, 70 F.3d 1288 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1834, 134 L.Ed.2d 940 (1996) 7

Nagle v. Alspach, 8 F.3d 141 (3d Cir. 1993), *cert. denied*, 510 U.S. 1215, 114 S.Ct. 1337, 127 L.Ed.2d 685 (1994) 11, 12

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) 5, 6, 12

Rogers v. Lodge, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012, *reh'g denied*, 459 U.S. 899, 103 S.Ct. 198, 74 L.Ed.2d 160 (1982) 8

United States v. Alvarez-Sanchez, 511 U.S. 350, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994) 6

United States v. Atkinson, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555 (1936) 10

United States v. Ortiz, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975) 9

Cases, continued: Page

United States v. X-Citement Video, Inc., 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) 11

Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740, *reh'g denied*, 440 U.S. 940, 99 S.Ct. 1290, 59 L.Ed.2d 500 (1979) 11

Yee v. Escondido, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) 6, 11

Statutes:

28 U.S.C. §1254 (1988) 1

28 U.S.C. §1331 (1980) 3

28 U.S.C. §2101 (1888) 1

Rules:

Supreme Court Rule 10. 1

Supreme Court Rule 14. 11

Supreme Court Rule 15. 1

11th Cir.R. 28, I.O.P. - 6 8

OFFICIAL AND UNOFFICIAL REPORTS AND OPINIONS DELIVERED IN THE CASE

United States' Magistrate Judge Turnoff's November 9, 1993 Report and Recommendation on Defendants' Motion for Summary Judgment .....App.[2] 67-75a

United States District Judge Davis' January 31, 1994 Order Adopting Magistrate's Report and Recommendation..... App. 21a

United States Court of Appeals' December 10, 1996 Order (*per curiam*).....App. 25-26a

United States Court of Appeals' February 26, 1997 Order on Petition(s) for Rehearing and Suggestion(s) of Rehearing *En Banc* (*per curiam*) ..... App. 37a

United States District Judge Davis' March 9, 1994 Order Denying Motion to Appeal *in Forma Pauperis*.....R. App. 1-2a

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[2]Hereinafter, all references to the Appendix to the Petition for a Writ of Certiorari and specific pages therein will be abbreviated as "App. ___ ." All references to the Appendix to the Respondents' Brief in Opposition to the Petition for a Writ of Certiorari and specific pages therein will be abbreviated as "R. App. ___."

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review, by Petition for Writ of Certiorari, the judgment of the United States Court of Appeals affirming the United States District Court's grant of summary judgment for Respondents,[3] pursuant to 28 U.S.C. §§1254(1) & 2102(c) (1988) and Rule 10(a) of the Supreme Court Rules.

STATEMENT OF THE CASE

I. Statement of Facts[4]

On or about June 21, 1976, Eastern Air Lines, Inc. ("EAL") hired TOSKI to work as a shop laborer at its Miami facility. *See* June 20, 1996 Brief of Appellees/ Respondents in the United States Court of Appeals ("Respondents' Brief") at R. App. 122a. Five (5) years later, EAL promoted TOSKI to the position of mechanic in its Ground Support Equipment Auto Shop ("GSE Shop"). *Id.* TOSKI remained in the GSE Shop for approximately six (6) weeks, when, as part of a reduction in its work force, EAL laid TOSKI off and reassigned him to a stock clerk position. *Id.* On April 24, 1984, EAL recalled TOSKI to the GSE Shop as a line mechanic. *Id.*

Throughout the next 2½ years, TOSKI's supervisors, who, at various times, included each of the Respondents, repeatedly experienced problems with TOSKI's job per-

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[3] App. 25-26a.

[4] The "Statement of the Case" section of TOSKI's Petition, pp. 2-3, is inaccurate, misleading and unsupported by the record in this case. Accordingly, in furtherance of their obligations under Rule 15.2 of the Supreme Court Rules, Respondents are compelled to correct TOSKI's misstatements of the record.

formance and attitude, including: (1) TOSKI's propensity for performing unnecessary and/or unauthorized work on company vehicles; (2) his repeated violations of EAL's rules and regulations; and (3) his failure to obey the instructions and directives of EAL management personnel. *Id.* at R. App. 123a.

Then, on November 7, 1986, Respondents McDONNELL and WILLIAMS determined that TOSKI had falsified a claim for medical benefits in conjunction with an incident that allegedly occurred between TOSKI and Respondent McDONNELL on October 24, 1986. *Id.* Respondents McDONNELL and WILLIAMS, in turn, reported TOSKI's actions to the appropriate EAL Labor Relations personnel and, on November 7, 1986, EAL terminated TOSKI'S employment. *Id.*

Five (5) days later, TOSKI filled out a grievance form relating to his termination. *Id.* [5] Significantly, however, TOSKI made a conscious decision not to pursue or, in the alternative, to delay his pursuit of that grievance before the System Board of Adjustment ("SBA"). *Id.* at R. App. 124a & 128-129a n. 20. As a result, the SBA never even considered, let alone issued a ruling on, TOSKI's grievance. *Id.*

II. Statement of Proceedings

In 1987, TOSKI filed suit against EAL, WILLIAMS, McDONNELL and others for injunctive relief and damages he allegedly sustained as a result of EAL'S decision to terminate his employment. *See* TOSKI's Complaint

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[5] Articles 17 through 19 of the Collective Bargaining Agreement between EAL and TOSKI's union, the IAMAW ("CBA"), indisputably governed the filing, prosecution and resolution of such grievances.

in *Toski v. Lorenzo, et al.*, Case No. 87-1422-CIV-ATKINS, at R. App. 167-180a. In that case, United States District Judge Atkins dismissed TOSKI's Complaint, based upon his findings that: (1) TOSKI had not exhausted his administrative remedies; and (2) TOSKI's claims were subject to compulsory arbitration. *See* Order on Application for Temporary Restraining Order, dated August 19, 1987, at R. App. 181-182a. Eighteen (18) months later, EAL filed a Chapter 11 Bankruptcy Petition, which resulted in a stay of TOSKI's action against EAL. *See* EAL's March 9, 1989 Certificate of Commencement of Case at R. App. 183a.

Unable to obtain relief against his employer (i.e., EAL) and in a thinly veiled attempt to circumvent the operation of the automatic stay, TOSKI then initiated this action against Respondents, individually, on October 23, 1990, in Florida state court. *See* Complaint at App. 1-20a. Respondents moved to dismiss or strike the Complaint and timely removed the case to the United States District Court for the Southern District of Florida ("district court"), based on federal question jurisdiction and pursuant to 28 U.S.C. §1331 (1980). *See* Respondents' Brief at R. App. 117a.

Respondents later answered the Complaint and, at the close of discovery, filed a Motion for Summary Final Judgment. In support of their Motion, Respondents asserted numerous independently dispositive grounds. *See* Respondents' August 17, 1993 Motion for Summary Final Judgment and Supporting Memorandum of Law ("Respondents' Motion for Summary Judgment") at R. App. 9-29a. Magistrate Judge William C. Turnoff, in turn, recommended that the district court grant Respondents' Motion. *See* Report and Recommendation, dated November 10, 1993, at App. 67-75a. In making his recommenda-

tion, Magistrate Judge Turnoff rejected TOSKI's contention that he did not fail to exhaust his administrative remedies, which was the sole basis of TOSKI's response to Respondents' arguments.[6] *See* Petitioner's November 11, 1993 Response to Respondents' Motion for Summary Judgment at R. App. 36-38a.

On February 1, 1994, District Judge Davis adopted Magistrate Judge Turnoff's Report and Recommendation "in its entirety" and granted Summary Final Judgment in favor of Respondents. *See* Order Adopting Magistrate's Report & Recommendation at App. 21a. On March 1, 1994, TOSKI appealed the Summary Final Judgment to the United States Court of Appeals for the Eleventh Circuit. *See* Petitioner's Notice of Appeal at App. 23a. In connection therewith, TOSKI filed a Motion to Proceed on Appeal *In Forma Pauperis* and a supporting Affidavit. Judge Davis denied TOSKI's Motion in a March 9, 1994 Order, because, from an objective standard, TOSKI's appeal was frivolous, i.e., there was "no demonstration that the issues central to the appeal are debatable."[7] *See* Order Denying Motion to Appeal *In Forma Pauperis* at R. App. 1-2a.

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[6]Magistrate Judge Turnoff did not address many of the arguments proffered by Respondents in their Motion for Summary Judgment with respect to the viability of TOSKI's state law claims, because he found those claims were preempted. App. 70-74a.

[7]The Eleventh Circuit denied TOSKI's April 11, 1992 Rule 24 Motion for Leave to Appeal *In Forma Pauperis* on July 7, 1994, on the grounds that TOSKI did not appear to be indigent. It later denied TOSKI's Motion for Reconsideration of the July 7, 1994 Order. On March 20, 1995, this Court denied TOSKI's December 20, 1994 Motion for Leave to Proceed *In Forma Pauperis* in the Supreme Court, Case No. 94-7524, for purposes of filing a Petition for Writ of Certiorari to review the lower courts' Orders denying TOSKI leave to appeal *in forma pauperis* in the Eleventh Circuit. R. App. 166a.

After conducting a *de novo* review of the record and construing the evidence in a light most favorable to TOSKI, the Court of Appeals concluded that "each of the arguments TOSKI makes concerning his procedural challenges to various orders of the district court and his arguments relative to the district court's grant of summary judgment for the defendants are meritless." Court of Appeals' December 10, 1996 Judgment at App. 25-26a. Accordingly, in a *per curiam* opinion, the Court affirmed the district court's grant of summary judgment in favor of the Respondents and against TOSKI. *Id.* Thereafter, TOSKI filed a Suggestion of Rehearing *En Banc* in which he argued, for the first time, that his state law claims were not pre-empted "by failure to exhaust any administrative remedy or the RLA." Petitioner's Suggestion of Rehearing *En Banc* at App. 27-36a. On February 26, 1997, the Court of Appeals summarily denied TOSKI's Suggestion and the instant appeal followed. *See* Order on Petition(s) for Reconsideration and Suggestion(s) of Rehearing *En Banc* at App. 37a.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO CONSIDER AN ISSUE WHICH THE PETITIONER DID NOT PROPERLY PRESERVE, WHERE THREE FEDERAL COURTS ALREADY HAVE REVIEWED PETITIONER'S CLAIMS AND, AT VARIOUS TIMES, CONCLUDED THAT THEY ARE "MERITLESS" AND THAT PETITIONER'S APPEAL IS FRIVOLOUS.

It is axiomatic that this is "a court of review, not one of first view." *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 457, 115 S. Ct. 2214, 2219, 132 L.Ed.2d 400, 408 (1995) (declining to review an issue

not presented in the courts of first and second instance); *Duignan v. United States,* 274 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996, 1000 (1927) ("This court sits as a court of review").

Thus, the Court repeatedly has held that it will not grant certiorari to consider issues and arguments that were not presented to the district court or the court of appeals, absent the most exceptional circumstances. *Oklahoma Tax Comm'n,* 515 U.S. at 457, 115 S.Ct. at 2219, 132 L.Ed.2d at 408 (citing *Yee v. Escondido,* 503 U.S. 519, 535, 112 S.Ct. 1522, 1533, 118 L.Ed.2d 153, 170 (1992) (citation omitted)). *See United States v. Alvarez-Sanchez,* 511 U.S. 350, 360 n. 5, 114 S.Ct. 1599, 1605 n. 5, 128 L.Ed.2d 319, 329 n. 5 (1994) ("Finding no exceptional circumstances . . . we adhere to our general practice and decline to address [an argument which was not raised in the District Court or the Court of Appeals] "); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed.2d 849, 851 (1940) ("it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below") (citing *Duignan,* 274 U.S. at 200, 47 S.Ct. at 568, 71 L.Ed. at 1000)).

A review of the record conclusively demonstrates that, in the district court, Petitioner did not assert the argument which forms the sole basis for the Question Presented for Review. *See* Petitioner's October 12, 1993 Response to Respondents' Motion for Summary Judgment at R. App. 36-38a; Petitioner's November 23, 1993 Objections to Magistrate Judge Turnoff's Report and Recommendation at R. App. 53-59a; Report and Recom-

mendation, dated November 9, 1993, at App. 73a (wherein Magistrate Judge Turnoff notes that "Defendants contend that RLA preemption, coupled with Plaintiff's failure to exhaust his administrative remedies, entitles them to summary judgment on each of these separate claims as well. Plaintiff's only response to this argument is that he did not fail to exhaust, which argument has now been rejected").

Moreover, TOSKI did not properly raise the argument that his state law claims were not preempted by the RLA in his initial brief in the Eleventh Circuit.[8] *See* April 15, 1996 Initial Brief of Appellant/Petitioner in the United States Court of Appeals ("Petitioner's Brief") at R. App. 78-86a. *See also* Respondents' Brief at R. App. 127-135a. In fact, it was not until after the Eleventh Circuit completed its *de novo* review of the District Court's grant of summary judgment in Respondents' favor and concluded that "[TOSKI's] arguments relative to the district court's grant of summary judgment in favor of the Defendants are meritless,"[9] that Petitioner first raised the issue framed in his Question Presented for Review.[10] Peti-

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[8]It is hornbook law that, even if the Petitioner had raised this new argument in the Court of Appeals, that court would not have considered it. *Mills v. Singletary*, 63 F.3d 999, 1008 n.11 ("arguments not presented in the district court will not be considered for the first time on appeal"), *reh'g, en banc, denied*, 70 F.3d 1288 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1834, 134 L.Ed.2d 940 (1996) (citations omitted).

[9]*See* Court of Appeals' December 10, 1996 Judgment at App. 25-26a.

[10]Although Petitioner previously had cited *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994), as "supplemental authority," in the Reply Brief he filed in the Eleventh Circuit, he did not, nor under the applicable Rules he was permitted to rely on *Norris* as "supplemental auth-

[footnote continued]

tioner did so in a Suggestion for Rehearing *En Banc,*[11] which the Eleventh Circuit, in turn, summarily denied *per curiam. See* Order on Petition(s) for Reconsideration and Suggestion(s) of Rehearing *En Banc* at App. 37a.

Accordingly, Petitioner did not present to the lower courts, let alone properly preserve, the issue which forms the sole basis for his Question Presented. *See Hoover v. Ronwin,* 466 U.S. 558, 574 n. 25, 104 S.Ct. 1989, 1998 n. 25, 80 L.Ed.2d 590, 603 n. 25, *reh'g denied,* 467 U.S. 1268, 104 S.Ct. 3564, 82 L.Ed.2d 865 (1984) ("We also do not address Ronwin's contention . . . made . . . for the first time in his response to petitioners' motion for rehearing in the Court of Appeals [because] [h]is failure to raise this issue in a timely manner precludes our consideration"); *Rogers v. Lodge,* 458 U.S. 613, 628 n. 10, 102 S.Ct. 3272, 3281 n. 10, 73 L.Ed.2d 1012, 1025 n. 10, *reh'g denied,* 459 U.S. 899, 103 S.Ct. 198, 74 L.Ed.2d 160 (1982) (refusing to consider appellants' contention which was not properly raised in or addressed by the Court of Appeals); *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362, 101 S.Ct. 1146, 1155, 67 L.Ed.2d 287, 298 (1981) (affirming the judgment of the court of appeals on the grounds that the question presented in the petition for certiorari was not raised in the court of appeals).

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ority" because: (a) the June 20, 1994 *Norris* opinion did not constitute an intervening decision or a new development, because Petitioner served his initial brief in the Eleventh Circuit on April 15, 1996; and (b) the decision was not relevant to any issue properly presented to the Eleventh Circuit in Petitioner's appeal. *See* Petitioner's Brief at R. App. 78-86a; Respondents' Brief at R. App. 127-135a; *supra* p. 7 n. 8. *See also* 11th Cir.R. 28, I.O.P. - 6, at R. App. 3a.

[11] App. 27-36a.

Consequently, absent a showing of "exceptional circumstances," this Court should not consider that argument on a Petition for a Writ of Certiorari. *See Auer v. Robbins*, ___ U.S. ___, 117 S.Ct. 905, 912, 137 L.Ed.2d 79, 92 (1997) (wherein the Court refused to consider a petitioner's argument which was inadequately preserved in the proceedings below) (citing *Adickes v. S.H.Kress & Co.*, 398 U.S. 144, 147 n. 2, 90 S.Ct. 1598, 1602 n. 2, 26 L.Ed.2d 142, 148 n. 2 (1970)); *Dothard v. Rawlinson*, 438 U.S. 321, 323 n. 1, 97 S.Ct. 2720, 2724 n. 1, 53 L.Ed.2d 786, 794 n. 1 (1977) (rejecting appellants' argument on the ground that, "[n]ot having been raised in the District Court, that issue is not before us"); *United States v. Ortiz*, 422 U.S. 891, 898, 95 S.Ct. 2588, 2589, 45 L.Ed.2d 623, 630 (1975) (declining to consider issue not raised in the appellate brief filed in the Court of Appeals).

Moreover, this case is far from "exceptional." The cases this Court considers "exceptional" involve questions of subject matter jurisdiction,[12] the finality and appealability of a judgment,[13] a state's Eleventh Amendment immunity from suit,[14] and issues that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Connor v. Finch*, 431 U.S. 407, 421 n. 19, 97 S.Ct. 1828, 1837 n. 19, 52 L.Ed.2d 465, 478 n. 19 (1977) (wherein the Court held that the constitutional validity of a court-ordered reapportionment of the

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[12] *See, e.g., Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978).

[13] *See, e.g., Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976).

[14] *See, e.g., Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978).

Mississippi House of Representatives was an "exceptional" circumstance meriting review in the absence of the parties raising the issue below) (quoting *United States v. Atkinson,* 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555, 557 (1936)).

Here, in contrast, both the District Court and the Court of Appeals independently have concluded that the Petitioner's procedural and substantive claims are frivolous and meritless. *See* Court of Appeals' December 10, 1996 Judgment at App. 25-26a (wherein the Court of Appeals held that the arguments advanced in Petitioner's appeal were "meritless"); March 9, 1994 Order Denying Motion to Appeal *in Forma Pauperis* at R. App. at 1-2a (wherein District Judge Davis denied Petitioner's Motion because TOSKI's appeal is frivolous). Because this action is not "exceptional," this Court should deny TOSKI's Petition for a Writ of Certiorari.

II. THE GRANT OF A WRIT OF CERTIORARI WOULD BE FUTILE BECAUSE THE PREEMPTION ISSUE, WHICH IS THE SOLE BASIS FOR PETITIONER'S APPEAL, IS ONLY ONE OF A NUMBER OF INDEPENDENT GROUNDS, WHICH, INDIVIDUALLY AND COLLECTIVELY, ARE SUFFICIENT TO SUPPORT THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS.

This Court has long recognized that a respondent may urge any ground asserted in the lower courts as a basis for affirming the decision of the Court of Appeals. *See Bennett v. Spear,* ___ U.S. ___ , 117 S.Ct. 1154, 1163, 137 L.Ed.2d 281, 298 (1997) (holding that a respondent may defend the judgment on any ground raised below); *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 38-39, 109 S.Ct. 2782, 2788, 106 L.Ed.2d 26, 38-39 (1989) ("a

prevailing party may, of course, 'defend its judgment on any grounds properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals' ") (quoting *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation,* 439 U.S. 463, 476 n. 20, 99 S.Ct. 740, 749 n. 20, 58 L.Ed.2d 740, 753 n. 20, *reh'g denied,* 440 U.S. 940, 99 S.Ct. 1290, 59 L.Ed.2d 500 (1979)).

This rule applies with equal force regardless of the extent to which a petitioner seeks to limit or narrow the scope of an appeal in its question presented.[15] *See United States v. X-Citement Video, Inc.,* 513 U.S. 64, 78, 115 S.Ct. 464, 473, 130 L.Ed.2d 372, 385 (1994) ("a prevailing party, without cross-petitioning, is 'entitled under our precedents to urge any grounds which would lend support to the judgment below' ") (quoting *Dayton Bd. of Educ. v. Brinkman,* 433 U.S. 406, 419, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851, 862 (1977)).

Thus, federal courts consistently have held that an appeal is "fore-ordained" to fail and, therefore, frivolous, where a petitioner challenges only one of several grounds upon which the lower courts based or properly could have based their judgment. *Nagle v. Alspach,* 8 F.3d 141, 143-44 (3d Cir. 1993) (affirming on the grounds that the appeal was frivolous, and "doomed to failure from the moment the plaintiff-appellant's brief was filed" because the appellant did not contest two of the four independent grounds upon which the district court based its judgment), *cert. denied,* 510 U.S. 1215, 114 S.Ct. 1337, 127 L.Ed.2d 685 (1994).

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[15] Conversely, Rule 14.1(a) provides that a petitioner is limited on a writ of certiorari to arguing the question presented, in order to allow, among other things, the respondent to sharpen its arguments as to why certiorari should not be granted. *See Yee,* 503 U.S. at 535-536, 112 S.Ct. at 1533, 118 L.Ed.2d at 170.

Here, TOSKI has asserted, as the sole basis for his Petition for a Writ of Certiorari, the question of whether the state law claims in his Complaint were preempted by the RLA. For the reasons set forth in Section I, TOSKI's assertion of that issue, for the first time, in this appeal, is fatal to his Petition. *See, e.g., Oklahoma Tax Comm'n,* 515 U.S. at 457, 115 S.Ct. at 2219, 132 L.Ed.2d at 408; *McGoldrick,* 309 U.S. at 434, 60 S.Ct. at 672, 84 L.Ed. at 851.

However, assuming *arguendo* that Toski previously had asserted and properly preserved the pre-emption issue for appeal, which he did not, it would not alter his lack of entitlement to certiorari review because he has not challenged the myriad of independent grounds that Respondents asserted in support of their Motion for Summary Judgment, which collectively are sufficient to support the District Court's grant of summary judgment. *See* Respondents' Motion for Summary Judgment at R. App. 4-31a; Respondents' Brief at R. App. 135-154a. *See also Granfinanciera, S.A.,* 492 U.S. at 38-39, 109 S.Ct. at 2788, 106 L.Ed.2d at 38-39. Accordingly, TOSKI's appeal is "doomed to failure" and his Petition for Writ of Certiorari should be denied. *Nagle,* 8 F.3d at 143-144.

CONCLUSION

Based upon the foregoing arguments and authorities, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October 6, 1997

Supreme Court, U.S.
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(3)

No. 97-217

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

BRUCE RICHARD TOSKI,

Petitioner,

v.

WILLIAM J. MCDONNELL,
JEFFERSON H. HENRY and
KENDALL G. WILLIAMS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION

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186PP

Page

TABLE OF CONTENTS

APPENDIX A – United States District Judge Davis' March 9, 1994 Order Denying Motion to Appeal *In Forma Pauperis*. 1a

APPENDIX B – 11th Cir.R. 28, I.O.P.-6. . . . . 3a

APPENDIX C – Defendants' August 17, 1993 Motion for Summary Final Judgment and Supporting Memorandum of Law (without exhibits) 4a

APPENDIX D – Plaintiff's October 12, 1993 Response to Defendants' Motion for Summary Final Judgment 32a

APPENDIX E – Plaintiff's November 23, 1993 Objection to Magistrate Turnoff's Report and Recommendation re: Defendants' Motion for Summary Judgment 50a

APPENDIX F – Initial Brief of Appellant, dated April 15, 1996, in the United States Court of Appeals for the Eleventh Circuit. 61a

APPENDIX G – Brief of Appellees, dated June 20, 1996, in the United States Court of Appeals for the Eleventh Circuit 93a

APPENDIX H – Toski's Amended Complaint in Case No. 87-1422-CIV-ATKINS in the United States District Court for the Southern District of Florida 167a

APPENDIX I – United States District Judge Atkins' August 20, 1987 Order on Motion to Proceed *In Forma Pauperis* and on Application for a Temporary Restraining Order in Case No. 87-1422-CIV-ATKINS 181a

Page

APPENDIX J – Eastern Airlines, Inc.'s March 9, 1989 Certificate of Commencement of Case Pending in the United States Bankruptcy Court in the Southern District of New York 183a

APPENDIX A

[Filed MAR 9 1994]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 91-112-CIV-DAVIS

BRUCE RICHARD TOSKI,

Plaintiff,

vs.

WILLIAM J. McDONNELL, JEFFERSON H. HENRY & KENDALL G. WILLIAMS,

Defendants.

ORDER DENYING MOTION TO APPEAL IN FORMA PAUPERIS

BEFORE THE COURT is Plaintiff's Motion to Proceed on Appeal in Forma Pauperis. This Court granted Summary Judgment in the Defendants' favor on January 31, 1994.

Appeal from a final judgment may only be taken if such appeal is asserted in good faith. Fed. R. App. P. 24(a). A proposed in forma pauperis appeal is not asserted in good faith if it is frivolous when viewed from an objective standard. *Coppedge v. United States,* 369 U.S. 438, 445, 82 S.Ct. 917, 921, 82 L.Ed.2d 21 (1962). This standard translates into a demonstration that reas-

onable jurists may find the issues central to the appeal debatable. *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4.

Summary Judgment was granted in the Defendants' favor largely out of failure by the Plaintiffs to exhaust his administrative remedies under the Railway Labor Act ("RLA"). When a dispute arises, the RLA provides for settlement through the contractually agreed upon grievance procedures. 45 U.S.C. §152 First. The Plaintiffs had initially filed a grievance in relation to the acts alleged in this suit, but voluntarily abandoned the claim.

While the Plaintiff has submitted the required affidavit in support of his Motion to Proceed on Appeal in Forma Pauperis, there has been no demonstration that the issues central to the appeal are debatable.

Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff's Motion to Appeal in Forma Pauperis is DENIED.

3/9/94

/s/ Edward B. Davis
Edward B. Davis
United States District Judge

cc:

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APPENDIX B

FEDERAL RULE OF APPELLATE PROCEDURE 28

I.O.P. – 6. Citation of Supplemental Authorities

[Where *intervening* decisions or *new* developments should be brought to the court's attention, counsel may direct a letter to the clerk with citations and succinct comment. *See* FRAP 28(j). Supplemental briefs may not be filed. If a new case is not reported, copies should be appended. The letter should be filed in four copies with service on opposing counsel.]

[Amended effective April 1, 1994.]

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CIVIL ACTION NO.: 91-0112 CIV-DAVIS
MAGISTRATE TURNOFF

BRUCE RICHARD TOSKI,

Plaintiff,

vs.

WILLIAM J. McDONNELL,
JEFF HENRY and KEN WILLIAMS,

Defendants.
_____/

DEFENDANTS' MOTION FOR SUMMARY FINAL JUDGMENT AND SUPPORTING MEMORANDUM OF LAW

The Defendants, WILLIAM J. McDONNELL, JEFF HENRY and KEN WILLIAMS (hereinafter sometimes collectively referred to as "Defendants"), move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for the entry of an Order granting summary final judgment in their favor and against the Plaintiff, BRUCE R. TOSKI (hereinafter "TOSKI"), on the grounds that the pleadings, depositions, answers to interrogatories, admissions and other undisputed record evidence conclusively demonstrate that there is no genuine issue of material fact with respect to any of his claims and that Defendants are entitled to judgment as a matter of

law. In support of their Motion, Defendants submit the following Memorandum of Law:

STATEMENT OF UNDISPUTED FACTS

On or about June 21, 1976, Eastern Air Lines (hereinafter "EAL") hired TOSKI to work as a shop laborer at its Miami airport facility. See Deposition of TOSKI, dated April 21, 1993 (hereinafter "TOSKI Deposition"), at 42.[1] Five (5) years later, EAL promoted TOSKI to the position of mechanic in its Ground Support Equipment Auto Shop (hereinafter "GSE Shop"). Id. at 48. TOSKI remained in the GSE Shop for approximately six (6) weeks, when, as part of a reduction in its work force, EAL laid TOSKI off and reassigned him to a stock clerk position. Id. at 48. On April 24, 1984, EAL recalled TOSKI to the GSE Shop as a line mechanic. Id. at 48 and 49.

Shortly thereafter and throughout the next 2 1/2 years, TOSKI's supervisors, which, at various times, included each of the Defendants, repeatedly experienced problems with TOSKI's job performance and attitude. Those problems included: (1) TOSKI's propensity for performing unnecessary and/or unauthorized work on company vehicles; (2) his repeated violations of EAL's rules and regulations; and (3) his failure to obey the instructions and directives of EAL management personnel.

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[1]Pertinent excerpts from TOSKI's Deposition are attached hereto as Composite Exhibit A. The remainder of the deposition, which is quite voluminous, will be made available for inspection by the Court if necessary.

See EAL's Letters of Discipline, Instruction, Reprimand and/or Job Performance, dated November 27, 1984, February 15, 1985, February 28, 1986, April 14, 1986, September 8 and 11, 1986, and October 23 and 24, 1986, copies of which are attached hereto as Composite Exhibit B.

Then, on November 7, 1986, Defendants McDONNELL and WILLIAMS determined that TOSKI had falsified a claim for medical benefits in conjunction with an incident that allegedly occurred between he and Defendant McDONNELL on October 24, 1986. See EAL's Letter of Termination, dated November 7, 1986, a copy of which is attached hereto as Exhibit C. Defendants McDONNELL and WILLIAMS, in turn, reported TOSKI's actions to the appropriate EAL Labor Relations personnel and, on November 7, 1986, EAL terminated TOSKI's employment. Id. See also Deposition of Peter Blanco, Labor Relations Representative for EAL, at 6 through 8, pertinent excerpts from which are attached hereto as Exhibit D. Five (5) days later, TOSKI filled out a grievance form relating to his termination. See TOSKI Deposition at 510 and 511. See also TOSKI's Appeal for Investigation Form, dated November 12, 1986, a copy of which is attached hereto as Exhibit E. Significantly, however, TOSKI made a conscious and strategic decision not to pursue or, in the alternative, to delay his pursuit of that grievance before the System Board of Adjustment (hereinafter "SBA"). See TOSKI Deposition at 511 through 515. As a result, the SBA never even considered,

let alone issued a ruling on, that grievance. Id. at 515.[2]

STATEMENT OF PROCEEDINGS

Despite the fact that he had not exhausted his administrative remedies, as required by the plain language of the CBA and the applicable judicial and statutory authorities, TOSKI filed suit against EAL, Defendants WILLIAMS and McDONNELL and others, seeking injunctive relief and damages for, among other things, wrongful discharge. A copy of TOSKI's Complaint in that action, styled Toski v. Lorenzo, et al., Case No. 87-1422-CIV-ATKINS, is attached hereto as Exhibit F. Judge Atkins, in turn, dismissed that Complaint based on his findings that: (1) TOSKI had not "exhausted[ed] his administrative remedies in pursuing his wrongful discharge claim;" and (2) TOSKI's "claims under the Railway Labor Act constitute `a minor dispute'. . . and, [therefore,] are subject to the compulsory arbitration procedures of [S]ection 153 [of the Act]." See Order on Application for a Temporary Restraining Order, dated August 19, 1987, a copy of which is attached hereto as Exhibit G. Eighteen (18) months later, EAL filed a Chapter 11 Bankruptcy Petition, which resulted in a stay of TOSKI's actions against the Company. See EAL's

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[2]Articles 17 through 19 of the Collective Bargaining Agreement between EAL and TOSKI's union, the IAMAW, (hereinafter "the CBA") govern the filing and resolution of such grievances . A copy of the CBA is attached as Exhibit B to Defendants' Memorandum of Law in Support of their Motion to Dismiss or Strike.

Certificate of Commencement of Case, dated March 9, 1989, a copy of which is attached hereto as Exhibit H.

Apparently frustrated at his inability to obtain relief against his employer (i.e., EAL) and in a thinly veiled attempt to circumvent the operation of the automatic stay, TOSKI initiated this action against the Defendants, individually, in state court. Defendants responded by filing a comprehensive Motion to Dismiss or Strike the Complaint and removed the case to this Court, based on federal question jurisdiction. After hearing oral argument on Defendants' Motion, Magistrate Turnoff recommended that the Court dismiss Counts I and VIII, which it did in an Order dated November 15, 1992. Copies of the Court's Order and Magistrate Turnoff's Report and Recommendation are attached hereto as Exhibits I and J, respectively. However, now that discovery in this matter is substantially complete, it is apparent from the uncontroverted record that, for the reasons set forth herein, the remaining Counts in TOSKI's Complaint also are legally and factually deficient. Therefore, the Defendants respectfully submit that they are entitled to judgment on those claims as a matter of law.[3]

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[3]It is axiomatic that, under Fed. R. Civ. P. 56, summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Celotex v. Catrett, 477 U.S. 317, 322 (1986). Moreover, the Supreme Court has made it clear that a trial court must enter summary judgment if a party fails to make a sufficient showing of an essential element of the case as to which that party has the burden

ARGUMENT

I. TOSKI'S CLAIM FOR RELIEF UNDER THE RAILWAY LABOR ACT, 45 U.S.C. §151 ET SEQ., IS TIME-BARRED BY THE APPLICABLE SIX (6) MONTH STATUTE OF LIMITATIONS.

The Railway Labor Act, 45 U.S.C. §151 et seq. (hereinafter "RLA"), does not specify the time within which an injured party must file claims under Section 152 of the Act. However, federal courts, relying on the reasoning of the U.S. Supreme Court in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), have repeatedly borrowed and applied the six (6) month limitations period found in Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160 (b), to a variety of such claims. See, e.g., Robinson v. Pan Am. World Airways, 777 F.2d 84 (2d Cir. 1985); Brock v.

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of proof at trial. Id. at 323. The moving party is not required to support its motion for summary judgment with affidavits or other materials negating its opponent's claims. Id. at 322. Instead, it satisfies its initial burden by pointing out that there is an absence of evidence to support the non-moving party's case. Id. Under Rule 56(e), the non-moving party is then required to go beyond the pleadings and, by its own affidavits, depositions, answers to interrogatories and admissions, designate specific facts showing that there is a genuine issue for trial. Id. at 324.

Republic Airlines, Inc., 776 F.2d 523 (5th Cir. 1985). See also Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co., 768 F.2d 914 (7th Cir. 1985) (Section 10(b)'s six (6) month limitations period governs action for breach of a collective bargaining agreement and an alleged violation of section 2, First of the RLA). Atkins v. Zantop Int'l Airlines, 18 Av. Cas. (CCH), ¶ 18,290 (E.D. Mich. August 28, 1984) (wherein the Court applied Section 10(b)'s six (6) month limitations period in dismissing a wrongful discharge claim under section 2, Third and Fourth of the RLA).

In Count IV of his Complaint, TOSKI alleges that Defendants violated 45 U.S.C. §152 (First, Second and Third) by purportedly: (1) failing to "make and maintain" the CBA; (2) failing to settle disputes in an expeditious manner; (3) refusing to allow TOSKI access to shop employees after his termination; and (4) attempting to coerce and influence shop mechanics prior to his election as shop steward. See TOSKI's Complaint at 21 and 22. However, a review of the undisputed record conclusively demonstrates that each of the Defendants' alleged acts and/or omissions occurred, if at all, well beyond six (6) months prior to the filing of the Complaint on October 23, 1990, and, therefore, are time-barred.

It is undisputed, for example, that TOSKI was elected Shop Steward on October 16, 1986. See TOSKI Deposition at 181. Thus, by definition, Defendant McDONNELL's alleged attempt to influence the vote in that election must have occurred, if at all, before that date or more than four (4) years prior to the filing of this lawsuit. Similarly, TOSKI alleges and has admitted that he last sought and was refused access to the EAL facility in July of 1987. Id. at 528 and 529. Accordingly, to the

extent that Defendants' refusal to afford him access to the property was actionable under the RLA, which Defendants deny, that claim must have accrued, if at all, on or before that date or more than three (3) years prior to the filing of his Complaint in this action.

The same is true with respect to TOSKI's remaining claims (i.e., that Defendants allegedly failed to settle disputes in an expeditious manner and/or failed to "make and maintain" the CBA), since those alleged failures must have occurred, if at all, sometime prior to EAL's decision to terminate TOSKI's employment on November 7, 1986 - slightly less than four (4) years prior to the filing of this action. In sum, none of the alleged acts or omissions of the Defendants occurred, if at all, within six (6) months of the filing of the Complaint in this action. Accordingly, TOSKI's claims under the RLA are time-barred, as a matter of law, and this Court should enter judgment on them in favor of the Defendants.[4]

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[4]Defendants also are entitled to summary judgment on TOSKI's claims under Section 152 (Second and Third) because he has not alleged, nor has he proffered any evidence, that Defendants are "carriers" within the meaning of the Act. See 45 U.S.C. §151 (First). See also 45 U.S.C. §181.

II. DEFENDANTS ALSO ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON TOSKI'S CLAIMS UNDER THE RLA, BECAUSE TOSKI DID NOT EXHAUST HIS ADMINISTRATIVE REMEDIES PRIOR TO FILING SUIT.

It is settled law that a party seeking relief under the RLA for claims involving the interpretation and application of a collective bargaining agreement must exhaust the grievance and arbitration procedures established by that agreement before filing suit. See, e.g., Andrews v. Louisville & Nashville R. Co., 406 U.S. 320, 324-25 (1972); Le Boutillier v. Air Line Pilots Ass'n Int'l, 778 F.2d 883 (D.C. Cir. 1985) (affirming the dismissal of a pilot's wrongful discharge action, based on his failure to "invoke the contractual procedure for contesting his discharge," notwithstanding conclusory allegations in plaintiff's complaint that resort to those procedures would have been futile). See also, Riddle v. Trans World Airlines, Inc., 512 F. Supp. 75 (W.D. Mo. 1981) (wherein the Court dismissed an employee's suit against his employer for wrongful termination, based on the employee's admitted failure to exhaust available administrative remedies); Stevens v. Braniff Airways, Inc., 490 F. Supp. 231 (D. Minn. 1980). Moreover, it is equally well established that the failure to do so mandates dismissal of the action for lack of subject matter jurisdiction. Riddle, 512 F. Supp. at 80.

The CBA at issue in the instant case contained an elaborate grievance procedure for the resolution of the

employment related issues which form the basis for TOSKI's Complaint. See Article Nos. 17 through 19 of the CBA. Moreover, it is undisputed that TOSKI was intimately familiar with and routinely availed himself of that procedure in challenging the disciplinary actions of his supervisors. See TOSKI Deposition at 103, 172 through 173 and 383. Significantly, however, the record also demonstrates that although he completed the paper work necessary to initiate the grievance process with respect to his claim for wrongful discharge, TOSKI made a conscious decision not to pursue or, alternatively, to delay the pursuit of that claim before the SBA. Id. at 511. As a result, the SBA never considered, let alone issued a ruling on that grievance. Id. at 515. TOSKI's failure to exhaust his administrative remedies divests this Court of jurisdiction to consider his claims for relief under the RLA and entitles Defendants to the entry of a summary judgment in their favor with respect to those claims.[5]

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[5]In fact, TOSKI is collaterally estopped from relitigating the issue of whether he is entitled to pursue his RLA based claims without first exhausting his administrative remedies by Judge Atkins' August 19, 1987 Order of Dismissal in Case No. 87-1422-CIV-ATKINS. See Exhibit F (wherein Judge Atkins held that the Court lacked jurisdiction to consider TOSKI's claims, because he had not exhausted his administrative remedies). See also Blonder-Tongue Lab. Inc. v. University of Ill. Found., 402 U.S. 313 (1971); Hann v. Carson, 462 F. Supp. 854, 864 (M.D. Fla. 1978).

III. UNDER THE DOCTRINE OF PREEMPTION, TOSKI'S FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES AND/OR TO ASSERT HIS RLA CLAIMS IN A TIMELY MANNER ALSO ARE FATAL TO HIS COMMON LAW TORT CLAIMS.

Apparently cognizant of the legal and procedural deficiencies in his claims under the RLA (Count IV) and the CBA (Count VI), TOSKI attempts to circumvent the six (6) month statute of limitations and the dispositive effect of his failure to exhaust his administrative remedies, by couching his labor dispute with EAL and Defendants in a variety of common law tort claims. What TOSKI fails to recognize, of course, is that the RLA preempts those claims, particularly where, as here, they involve "minor disputes" and are based on "a matrix of facts [that] are inextricably intertwined with the grievance machinery of the collective bargaining agreement and the [RLA]." Higgins v. Newhouse, 1990 U.S. App. Lexis 15772, 3 (6th Cir. 1990)(cases cited therein), a copy of which is attached hereto as Exhibit K. See also Exhibit F (in which Judge Atkins found that the claims which TOSKI now seeks to assert as tort actions constitute "`minor disputes' . . . and, [therefore] are subject to the compulsory arbitration procedures of section 153 [of the Act]"). Thus, TOSKI's failures to exhaust his administrative remedies and/or to assert his RLA claims in a timely manner also are fatal to his tort claims. See Higgins, at p. 5 (wherein the Court, citing the preemptive effect of the RLA, held that a flight attendant's failure to exhaust her administrative remedies

operated to bar her claims for libel, slander, assault and battery, and interference with employment against Northwest Airlines and three co-workers as a matter of law).

IV. THIS COURT SHOULD ENTER SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON TOSKI'S CLAIM FOR NEGLIGENT RETENTION, BECAUSE EAL AND NOT DEFENDANTS HENRY OR WILLIAMS WAS McDONNELL'S "EMPLOYER" UNDER FLORIDA LAW.

In order to prevail on a claim for negligent retention in Florida, a plaintiff must plead and prove that, during the course of his employment, an employer failed to investigate, discharge or reassign an employee, when he knew or should have known of problem, which rendered the employee unfit to perform his job. See, e.g., Garcia v. Duffy, 492 So. 2d 435, 438-39 (Fla. 2d DCA 1986). Thus, it is not surprising that Florida courts require plaintiffs who seek relief on a theory of negligent retention to name the employer of the allegedly culpable employee as a defendant in the action. See, e.g., Byrd v. Richardson-Greenshield Securities, Inc., 552 So. 2d 1099 (Fla. 1989). See also Bennett v. Godfather's Pizza, Inc., 570 So. 2d 1351 (Fla. 3d DCA 1990).

In Count II of his Complaint, TOSKI alleges that Defendants HENRY and WILLIAMS negligently retained Defendant McDONNELL. However, the record is

completely devoid of any evidence, which, if believed, would establish that HENRY or WILLIAMS was Defendant McDONNELL's "employer," as required by Florida law. For example, there is no evidence that Defendant HENRY hired Defendant McDONNELL or that he had the authority to reassign or fire him. In fact, if TOSKI is to be believed, Defendant HENRY was nothing more than "a bottom of the totem pole [shop] foreman," who had at least two layers of management supervision above him at virtually all times material to the Complaint. See Deposition of TOSKI at 55 and 56.

The record is similarly devoid of any evidence that Defendant WILLIAMS was Defendant McDONNELL's "employer" for any purpose. In fact, the undisputed record establishes that Defendant WILLIAMS did not have any involvement in the alleged acts or omissions that gave rise to this dispute until November 3, 1986 (i.e., four days prior to TOSKI's termination), when he assumed the position of Manager in the GSE Shop. Id. at 482. More importantly, there is no evidence to suggest that, during that four day period, Defendant WILLIAMS acquired knowledge which would have warranted Defendant McDONNELL's dismissal or that he had the unilateral authority to effectuate such a dismissal. Indeed, there is no evidence that Defendant WILLIAMS even had the authority to terminate TOSKI, a line mechanic, without the approval of senior EAL management personnel. Id. at 505.

Simply stated, there is no evidence that anyone other than EAL was Defendant McDONNELL's "employer" for purposes of assessing TOSKI's alleged entitlement to damages for negligent retention. Accordingly, TOSKI's failure to name EAL as a party

Defendant defeats the claim for negligent retention in Count II of the Complaint as a matter of law.

V. DEFENDANT WILLIAMS IS NOT AN "EMPLOYER" WITHIN THE MEANING OF §440.02, FLA. STAT. (1989) AND, THEREFORE, HE CANNOT BE HELD LIABLE FOR WRONGFUL DISCHARGE, UNDER §440.205, FLA. STAT. (1987), AS A MATTER OF LAW.

In Count III of his Complaint, TOSKI seeks to recover damages against Defendant WILLIAMS on a theory of wrongful discharge. Specifically, TOSKI alleges that Defendant WILLIAMS violated §440.205, Fla. Stat. (1987) of Florida Worker's Compensation Law, which provides, in pertinent part, that:

> no employer shall discharge, threaten to discharge, intimidate or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law.

Id. (emphasis added). See also Paragraph No. 101 of TOSKI's Complaint at p. 19. However, a review of the applicable statute and the undisputed record conclusively demonstrates that TOSKI cannot prevail on a wrongful discharge claim under Section 440.205 as a matter of law.

The legal and factual deficiencies in TOSKI's wrongful discharge claim are twofold. First, TOSKI has

not proffered any evidence that Defendant WILLIAMS was an "employer", within the meaning of §440.02(13), Fla. Stat. (1987), which defines "employer" for purposes of the Act as:

> the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver of trustees of any person.

Id. Indeed, the undisputed record affirmatively demonstrates that EAL, and not Defendant WILLIAMS was TOSKI's "employer" for purposes of the Act. There is no dispute, for example, that EAL hired TOSKI or that it directed his transfers from one position in the company to another. Id. at 42. In addition, there is no question that EAL was the issuer of TOSKI's paychecks. Id. at 497. More importantly, despite his obvious reluctance to do so, TOSKI ultimately conceded that it was "EAL with [Defendant WILLIAMS] as a duly authorized agent, [that] terminated [his] employment on November 7, 1986." Id. at 500 (emphasis added).

In contrast, Defendant WILLIAMS bears none of the indicia traditionally associated with an employer. In fact, Defendant WILLIAMS was not even working at the Miami facility when EAL hired TOSKI. See TOSKI Deposition at 104. Moreover, TOSKI has admitted that he did not have any dealings with Defendant WILLIAMS before November 3, 1986 (i.e., four days prior to TOSKI's termination), when Defendant WILLIAMS assumed the position of Manager in the GSE Shop. Id. at p. 482. More

importantly, there is no evidence that Defendant WILLIAMS had the authority to terminate TOSKI without the approval of senior EAL management personnel. Id. at 505.

Additionally, TOSKI has not proffered any evidence that he had a "valid claim for compensation" or ever "attempt[ed] to claim compensation under the Worker's Compensation Act," as required by the plain language of the statute. Section 440.205 (emphasis added). Instead, the undisputed record demonstrates that the sole reason TOSKI even reported the purported injury to EAL's First Aid Department on November 6, 1986 was to document an alleged incident that had occurred between himself and Defendant McDONNELL. See TOSKI Deposition at 451. In the absence of such proof, Section 440.205 is, by its own terms, inapplicable. Accordingly, this Court should enter Summary Judgment in favor of Defendant WILLIAMS on Count III of the Complaint.[6]

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[6]This Court also should enter judgment in favor of Defendant WILLIAMS on the claim for attorneys' fees in Count III, since the basis for TOSKI's wrongful discharge action is §440.205, Fla. Stat. (1987) and not the General Labor Relations Act, §448.01, et seq., Fla. Stat. (1984). See e.g., Munsey v. General Tel. Co., 538 So. 2d 1328 (Fla. 2d DCA 1989) (holding that where, as in the instant case, an employee's claim for damages arises under a statute other than Florida's General Labor Relations Act, the employee is not entitled to avail himself of Section 448.08 as a means of recovering the attorneys' fees incurred in prosecuting the action).

VI. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT V OF TOSKI'S COMPLAINT, BECAUSE FLORIDA DOES NOT RECOGNIZE AN IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN A CLAIM INVOLVING WRONGFUL DISCHARGE.

Florida courts have steadfastly refused to recognize a cause of action for breach of an alleged "duty of good faith and fair dealing" where the basis of the plaintiff's claim is wrongful discharge. See, e.g., Kelly v. Gill, 544 So. 2d 1162 (Fla. 5th DCA 1989). See also Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. 2d DCA 1983). In Kelly, for example, the plaintiff brought a wrongful discharge action against his former employer. The employer, in turn, successfully moved for summary judgment on the wrongful termination claim. However, the trial court granted summary judgment in favor of the former employee on his claim for injunctive relief. Both parties appealed.

The appellate court affirmed the trial court's judgment against the former employee, but reversed the judgment insofar as it awarded the employee injunctive relief. In reaching its decision, the Court relied on the well-established premise that, in the absence of a specific statute granting a property interest, a contract of employment which is indefinite as to the term of employment is terminable at the will of either party. Smith v. Piezo Technology & Professional Administrators, 427

So. 2d 182 (Fla. 1983); Gibbs v. H.J. Heinz Co., 536 So. 2d 370 (Fla. 5th DCA 1988); McConnell v. Eastern Airlines, Inc., 499 So. 2d 68 (Fla. 3d DCA 1986).

In the instant case, TOSKI attempts to allege a cause of action for breach of a "covenant of good faith and fair dealing" in Count V of his Complaint. However, there is no evidence to support the proposition that he had a contract with EAL which was definite as to the term of employment. On the contrary, the record evidence establishes that EAL had the absolute right to terminate TOSKI, particularly for cause. Moreover, TOSKI has not alleged the existence of or directed Defendants to any statute, which created a property interest in his employment with EAL. Thus, there is no proof, which, if believed, would allow TOSKI to maintain an action for breach of an "implied covenant of good faith and fair dealing" against Defendants. Therefore, this Court should enter judgment in Defendants' favor on Count V of the Complaint as a matter of law.[7]

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[7]Defendants also are entitled to judgment as a matter of law on TOSKI's claim for breach of an "implied covenant of good faith and fair dealing," because: (1) such a covenant does not exist, as a matter of law, between TOSKI and his co-employees, see, e.g., Smith 427 So. 2d at 184; see also McConnell, 499 So. 2d at 69; and (2) the undisputed record establishes that EAL and not Defendants was TOSKI's employer at all times material to this action. See Section V, supra.

VII. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON COUNT VI OF THE COMPLAINT, BECAUSE THEY ARE NOT PARTIES TO THE AGREEMENT WHICH FORMS THE BASIS FOR TOSKI'S BREACH OF CONTRACT CLAIM.

Although Florida courts have never specifically addressed the issue, courts in other jurisdictions have consistently held that a plaintiff may not hold a defendant accountable for the breach of a contract unless he pleads and proves that the defendant was a party to the agreement. See, e.g., Implement Serv., Inc. v. Tecumseh Products, Co., 726 F. Supp. 1171, 1182 (S.D. Ind. 1989) (summary judgment proper where it is apparent from the face of the complaint that the defendant was not a party to the distributorship agreement); Mellencamp v. Riva Music Ltd., 698 F. Supp. 1154 (S.D.N.Y. 1988) (wherein the court dismissed a songwriter's breach of contract claims against two recording companies, who were not parties to the disputed publishing agreements, notwithstanding the fact that they "assisted" the other defendants in the "administration" of those agreements); See also Kinion v. Design Systems, Inc., 641 P.2d 472 (Mont. 1981).

In Count VI of his Complaint, TOSKI attempts to state a cause of action for breach of contract against Defendants. However, a cursory review of the allegations in Count VI, as well as the plain language of the CBA that forms the basis for TOSKI's claims, conclusively demonstrates that Defendants are not parties to that Agreement. See Paragraph Nos. 8 and 116 of TOSKI's

Complaint at pp. 2 and 24, respectively. Instead, it is apparent that the parties to that Agreement are EAL and the IAMAW, neither of whom is a party Defendant in this action. Id. Accordingly, TOSKI's claim for breach of contract is fatally deficient and this Court should enter judgment as a matter of law in favor of Defendants on Count VI of the Complaint.[8]

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[8]It is, of course, axiomatic that, under Florida law, a party may not recover punitive damages for breach of contract, irrespective of the motive of the defendant, unless he pleads and proves that the breach was attended by a "separate and independent tort" which is, in itself, sufficient to support such an award. See, e.g., Lewis v. Guthartz, 428 So. 2d 222 (Fla. 1982). See also Rolls v. Bliss & Nyitray, Inc., 408 So. 2d 229 (Fla. 3d DCA 1981). Since TOSKI has not alleged, nor can he prove, that, in conjunction with the alleged breach, Defendants committed a separate and independent tort which would warrant the imposition of such damages, he not entitled to recover punitive damages in Count VI and this Court also should enter summary judgment in Defendants' favor as to that claim. See Section XII, infra.

VIII. THIS COURT SHOULD ENTER SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS HENRY AND McDONNELL ON TOSKI'S CLAIM THAT THEY WRONGFULLY DESTROYED EVIDENCE, BECAUSE TOSKI CANNOT ESTABLISH ANY OF THE ELEMENTS NECESSARY TO MAINTAIN SUCH AN ACTION UNDER FLORIDA LAW.

Florida courts recently recognized "negligent destruction of evidence" as an independent cause of action. See, e.g., Continental Ins. Co. v. Herman, 576 So. 2d 313 (Fla. 3d DCA 1991). See also Miller v. Allstate Ins. Co., 573 So. 2d 24 (Fla. 3d DCA 1990). However, these courts have made it clear that a plaintiff may not maintain such an action unless he alleges and proves each of the following elements:

> (1) [the] existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; (3) [the] destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; [and] (6) damages.

Continental Ins. Co., 576 So. 2d at 315 (emphasis added) (wherein the court held that a plaintiff, who already had

recovered substantial damages for injuries she sustained in an automobile accident, notwithstanding the partial disassembly and ultimate destruction of the subject vehicle, did not have a cause of action for destruction of evidence, because "she suffered no significant impairment in [her] ability to prove the underlying lawsuit").

In Count VII of his Complaint, TOSKI alleges that Defendants McDONNELL and HENRY failed to protect a G.E.A.R.S. (i.e., work order) relating to work that was the subject of a grievance he filed with the SBA. Significantly, however, the record is completely devoid of evidence which, if believed, would establish any of the elements necessary to make that alleged "failure to protect" actionable. For example, TOSKI has not alleged, let alone proffered evidence sufficient to establish the existence of or the potential for a "civil action" or "lawsuit" relating to the subject evidence. Instead, TOSKI merely alleges that the purported evidence would have benefited him in various grievance proceedings and/or enhanced his "prospective bargaining advantage." See Paragraph Nos. 127 and 128 of TOSKI's Complaint at p. 26. More importantly, TOSKI has not alleged or proffered evidence that Defendants had a statutory and/or contractual "duty to retain and protect" the subject evidence. TOSKI also has not proffered any evidence that Defendants HENRY or McDONNELL destroyed the subject work order.[9] Finally, TOSKI does not allege, nor

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[9]In fact, TOSKI has affirmatively acknowledged he has no recollection of the records retention policy at EAL with respect to such work orders and, therefore, has no basis for disputing EAL's position that the subject work

has he proffered proof that the Defendants' purported failure to discharge that duty resulted in any damages. In sum, there is no evidence in the record, which, if believed, would establish any of the elements necessary to maintain an independent action for negligent destruction of evidence. Accordingly, this Court should enter a judgment in favor of Defendants HENRY and McDONNELL on Count VII of the Complaint.

XII. THERE IS NO EVIDENCE THAT DEFENDANTS ACTED WITH THE DEGREE OF CULPABILITY WHICH IS REQUIRED TO SUPPORT A CONVICTION FOR MANSLAUGHTER AND, THEREFORE, TOSKI'S CLAIMS FOR PUNITIVE DAMAGES ARE INSUFFICIENT AS A MATTER OF LAW.

It is settled law in Florida that mere allegations of simple negligence, without evidentiary support, will not support an award of punitive damages. See Winn & Lovett Grocery Co. v. Archer, 171 So. 214 (Fla. 1936). In fact, even allegations amounting to gross negligence, without more, do not justify the imposition of punitive damages. See White Constr. Co. v. DuPont, 455 So. 2d 1026 (Fla. 1984). Instead, the Florida Supreme Court has

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order was discarded after six (6) months as part of its routine business practices. See TOSKI Deposition at p. 152.

made it clear that the degree of negligence necessary to support an award of punitive damages is the same as that which is required to support a conviction of manslaughter under the "culpable negligence" standard. Id. at 1028. See also Como Oil Co. v. O'Laughlin, 466 So. 2d 1061, 1062 (Fla. 1985); Ten Associates v. Brunson, 492 So. 2d 1149 (Fla. 3d DCA 1986). It is equally well-settled that where the allegations of the complaint, even if taken as true, would not satisfy this stringent standard, the appropriate remedy is a motion to strike the claim. See, e.g., Bradenton Mall Associates v. Hill, 508 So. 2d 538 (Fla. 2d DCA 1987).

Although TOSKI includes claims for punitive damages in Counts I, II, V and VI of his Complaint, he has not proffered any evidence that Defendants engaged in the type of conduct that Florida courts require to substantiate such a claim. In fact, there is no evidence in the record which even remotely establishes the degree of culpability on the part of the Defendants necessary to maintain a claim for punitive damages under the White standard. Accordingly, TOSKI has not stated a claim for punitive damages against Defendants and, therefore, this Court should strike any and all such claims from the Complaint with prejudice.

XIII. TOSKI DOES NOT HAVE ANY EVIDENCE THAT DEFENDANTS WERE ENGAGED IN A CONSPIRACY AND, THEREFORE, DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON COUNT IX OF HIS COMPLAINT.

Florida courts have consistently held that a party cannot prevail on a claim for civil conspiracy unless he pleads and proves: (1) an agreement between two or more persons to achieve an unlawful objective; (2) one or more overt acts pursuant to the agreement; and (3) resulting injury to the plaintiff. See Stringfellow v. Breidegam, 138 So. 2d 75, 76 (Fla. 3d DCA 1962). Moreover, it is equally well-established that members of a single economic unit, such as officers and/or personnel associated with any one corporation, do not constitute the required combination of separate economic groups or forces to support a cause of action for the independent tort of conspiracy. See Bryant Heating & A.C. v. Carrier Corp., 597 F. Supp. 1045 (S.D. Fla. 1984). See also American Credit Card Tel. v. N.Y. Pay Tel., 504 So. 2d 486 (Fla. 1st DCA 1987) (in a multi-count complaint, the District Court of Appeal affirmed the trial court's dismissal of plaintiff's complaint with respect to civil conspiracy where there were no allegations that corporate officers were acting under any independent motivation, as required to state a conspiracy claim against officers individually); Baker v. McDonald's Corp., 686 F. Supp. 1474 (S.D. Fla. 1987), aff'd, 865 F.2d 1272, (11th Cir. 1988).

In Count IX of his Complaint, TOSKI attempts, by

way of conclusory allegations, to assert a claim for civil conspiracy. Significantly, however, TOSKI has not alleged, nor has he since proffered proof that there was an agreement between Defendants McDONNELL, HENRY and WILLIAMS for any purpose. TOSKI also has not proffered any evidence that Defendants performed an unlawful act or a lawful act by unlawful means in furtherance of that agreement. On the contrary, TOSKI has candidly admitted that he does not have any direct evidence that such a conspiracy existed by and between the Defendants. See TOSKI Deposition at 570 through 572. In fact, aside from some unsupported speculation, TOSKI does not have any proof that Defendants HENRY and/or McDONNELL even participated in the decision to terminate his employment. Id. at 502 through 504. The complete absence of such proof is fatal to TOSKI's claim for civil conspiracy. Accordingly, this Court should enter summary judgment in favor of Defendants on Count IX of the Complaint.[10]

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[10]This Court also should enter summary judgment in favor of Defendants on the claim for "attorneys' fees" in Count IX and III of the Complaint, because: (1) TOSKI has not alleged that a contractual or statutory basis exists for such an award, as required by Florida law, see, e.g., Dorner v. Red Top Cab & Baggage Co., 37 So. 2d 160, 161 (Fla. 1948), Caceres v. Physicians Protective Trust Fund, 489 So. 2d 869 (Fla. 3d DCA 1986); and (2) as a pro se litigant, TOSKI has not paid, nor has he incurred an obligation to pay, any "attorney's" fees in conjunction with the prosecution of this action, see Cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. 1981) (where a prevailing

CONCLUSION

For the foregoing reasons, Defendants, WILLIAM J. McDONNELL, JEFF HENRY and KEN WILLIAMS, respectfully request that this Court enter summary final judgment in their favor and award any and all such further relief to which they may be entitled.

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plaintiff, who appeared pro se in employment discrimination action, was not entitled to recover attorney's fees), see also Winicki v. Mallard, 441 So. 2d 693 (Fla. 1st DCA 1983) (wherein the court held that a pro se attorney in a civil rights action was not entitled to attorneys' fees under Florida law).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that at true and correct copy of the above and foregoing was sent by regular mail to Bruce Richard Toski, pro se, at 2361 S.W. 36 Terrace, Ft. Lauderdale, Florida 33312, this _____ day of August, 1993.

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APPENDIX D

UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 91-0112-CIV-DAVIS
Magistrate Judge TURNOFF

BRUCE RICHARD TOSKI,

Plaintiff,

v.

WILLIAM J. MCDONNELL, JEFFERSON H. HENRY, and KENDALL G. WILLIAMS,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY FINAL JUDGMENT

The Plaintiff, BRUCE RICHARD TOSKI (hereinafter "Plaintiff"), pro-se / forma pauperis, hereby files his response to the Defendants', WILLIAM J. MCDONNELL, JEFFERSON H. HENRY, and KENDALL G. WILLIAMS (hereinafter collectively referred to as the "Defendants") MOTION FOR SUMMARY FINAL JUDGMENT (hereinafter referred to as "Motion") and states as follows:

Throughout the Motion, defense council predictably mis-quotes and/or cites out of context, statements made during the Plaintiff's three (3) day deposition. Defense

council has done this several times in the past when quoting cases and now is continuing this illicit practice with the Plaintiff lengthy deposition transcript. Pursuant to Rule 106 Federal Rules of Evidence, Plaintiff requests the entry of an Order compelling the Defendants to file complete copies of all deposition transcripts - which they have had transcribed - with the Clerk of this Court. Since Plaintiff is restricted to 10 pages he can not go into detail, but for the record Plaintiff objects to the Defendants' entire "Statement of *Undisputed* Facts" and asks that it be stricken from the record. Defense counsel can not resist making prejudicial assertions and extrapolations and inserting them between actual statements of fact, e.g. the use of words "apparently frustrated, "thinly veiled attempt to circumvent", "comprehensive", substantially complete", "it is apparent from the uncontroverted record", "legally and factually deficient", and finally the legal assumption that "they are entitled to judgment on those claims as a matter of law." Then Defense counsel uses a single spaced footnote - more than 2" long - in order to squeeze more of their ***legal argument*** into their "STATEMENT OF PROCEEDINGS" section. Once again, defense counsel mis-interprets Judge Davis's Order of November 15, 1991[1] to mean that all of Count I was dismissed. Count I was only dismissed insofar as a section alleging a second battery by McDonnell which the Court said was past the four (4) year statute of limitations.

Finally, defense counsel misleads this Court into believing that Judge Atkin's ORDER (Def. Exh. "G") refers to the complaint, which defense counsel attached

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[1]Defense counsel erroneously state that Judge Davis's ORDER was entered on November 15, 1992. *In fact* the ORDER was entered in 1991.

as Exhibit "F". Cursory examination will show that said ORDER was entered almost *two (2) years* in advance of the complaint!

MEMORANDUM OF LAW

I. PLAINTIFF'S CLAIM FOR RELIEF IN COUNT IV – PARTIALLY BASED ON THE RAILWAY LABOR ACT – IS NOT SUBJECT TO A SIX (6) MONTH STATUTE OF LIMITATIONS "BORROWED" FROM THE NATIONAL LABOR RELATIONS ACT.

Defense counsel asserts that Count IV should be eliminated because of its partial reliance on the RLA, that since the RLA does not specifically proscribe a statute of limitations, that this Court should "borrow" a six (6) month limitation period found in the National Labor Relations Act. The NLRB created by the NLRA had/has no jurisdiction over the case at bar. This case arises from circumstances surrounding the Plaintiff's employment under the Defendants while working at EAL. The relationship between the Plaintiff and the Defendants was governed by the "AGREEMENT" *See AGREEMENT,* Preamble, page 1. The Defendants, as agents of EAL, were bound to comply with terms of the AGREEMENT. *Id.* The AGREEMENT was "made and entered into in accordance with the provisions of the RLA". *Id.* The RLA was established by Congress in 1926 and covers employees in the airline and railroad industries. *See* 45 U.S.C. §151 et seq. The NLRA was passed in 1935 and employers subject to the RLA are specifically excluded from the NLRA's jurisdiction. *See* 29 U.S.C. §182. Plaintiff's suit is based largely on state claims and was filed originally in state court. In *fact* reference to the RLA is not even required to plead Count IV, Plaintiff

simply added RLA law to show that federal law reinforces state law provisions and to obtain compensatory fines specified in the RLA, if obtainable. In Plaintiff's nine (9) Count complaint the RLA is only referred to one more time - in Court VI for BREACH OF CONTRACT - which should also be decided based on state substantive law. In *Harper v. General Dynamics Corp.*, 117 LRRM 3197, (S.D. Cal. 1984), a suit for wrongful discharge and breach of the covenant of good faith and fair dealing, the court found that the mere existence of a collective bargaining agreement and the plaintiff's utilization of its grievance procedure to contest his discharge, did not confer exclusive federal jurisdiction under the Labor Management Relations Act. State limitations periods apply in suits which are unrelated to the duty of fair representation *See Monarch Long Beach Corp. v. Soft Drink Workers Local 812*, 762 F.2d 228 (2d Cir. 1985). The major part of this action is based on state law and thus a state statute of limitations should apply.

Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), cited by defense counsel, explores the limitations question in very thorough detail. However, because the facts of *Costello* differ greatly from the case *sub-judice*, the finding of the court in *Costello* need not apply to the case herein. Where the state limitations period does not conflict with federal policy and prejudices neither employer nor employee, and especially where the RLA has not enunciated any statute of limitations, state law should be regarded as the rule of decision. *See* 28 U.S.C. § 1652. Defense counsel has not advanced even one national interest or policy that would be advanced by the "borrowing" of the 6 month limitation in this case. In fact, there is no federal policy at stake. In the case at bar - where the employer in question has

ceased to exist and the Plaintiff has accepted his discharge as final - no compelling reason remains to support a short statute of limitations, which is usually advanced in the hopes of ushering in labor peace.

Even if this Court enforces a six (6) month statute of limitations, the tolling effected by Fla. Stat. 95.051 (g), validates most if not all of Plaintiff's pleadings. If this court determines that Count IV is barred by a statute of limitations then plaintiff would assert that the federal question upon which defendants relied for removal has been extinguished and hence this Court would no longer be able to assert pendant (supplemental) subject matter jurisdiction over this case and the plaintiff would respectfully request at that time that the case be remanded back to state court.

II. PLAINTIFF HAS EXHAUSTED ALL AVAILABLE ADMINISTRATIVE REMEDIES PRIOR TO THE FILING OF THE CASE *SUB JUDICE* AND THEREFORE HIS CLAIMS SHOULD BE ALLOWED TO PROCEED.

The Plaintiff properly filed and pursued a grievance alleging discharge without cause. By operation of law, the grievance process was rendered moot when EAL went bankrupt. Notwithstanding the above, if an employee accepts his discharge as final - as is the case herein - he is not required to exhaust administrative remedies, and can bring an action at law in the appropriate state court. *Walker v. Southern Railway Company,* 87 S.Ct. 365 (1966); *Accord Florida East Coast Railway Company v. Hill,* 233 So.2d 845 (3rd DCA Fla. 1970); *See also Belanger v. NY Central R. Co.,* 384 F.2d 35 (C.A. Mich. 1967). Defense counsel cited *Andrews v. Louisville & Nashville R. Co.,* 406 U.S. 320, 324-25 (1972) but that

case is distinguishable in its facts. In *Andrews* the Court cited the holding in *Walker* as proper under the circumstances. See *Andrews* at 325. In *Walker* railroad employees had to wait over 10 years - in some cases - for their grievances to be heard by the National Railroad Adjustment Board. This is analogous to the case at bar where the grievance procedure became nonexistent upon EAL's bankruptcy filing.

The Illinois Supreme Court ruled that employees covered by a collective bargaining agreement need not exhaust grievance procedures to file and maintain a tort action for wrongful retaliatory discharge for filing a Workers' Compensation claim. State public policy against retaliatory discharge of employees for filing claims under Workers' Compensation Act applies with equal force to union employees who are covered by collective bargaining contracts that contain specific grievance procedures to ensure discharge from employment only for "just cause". It would be reasonable to immunize from punitive damages an employer that unjustly discharges a union employee, while allowing imposition of punitive damages against an employer that unfairly terminates a nonunion employee. Allowing tort action is not violative of federal labor-law policy promoting arbitration, in view of important public interest in protecting rights of workers under the Act and in deterring unscrupulous employers from discharging employees, and lack of any perceptible effect such actions would have on use of arbitration. *Midgett v. Sackett-Chicago Inc.; Gonzalez v. Prestess Engineering Corp.*, Nos. 59341 and 59350, October 19, 1984. Illinois Supreme Court. *See also Kelsay v. Motorola Inc.* (1978), 74 Ill. 2d 172, 115 LRRM 4371.

A. PLAINTIFF'S PREVIOUS APPLICATION FOR A PERMANENT INJUNCTION AGAINST EAL DOES NOT COLLATERALLY ESTOP HIM FROM PURSUING THE CLAIMS HEREIN.

Although the two suits have some facts and allegations in common, the thrust of Plaintiff's application for a permanent restraining order against EAL has no bearing on the case at bar. EAL's lockout of the IAM and subsequent liquidation have rendered all but the damages section of 87-1422-CIV-ATKINS moot. Although the Defendants were named in that application for TRO, they were never properly served.

III. SINCE THE PLAINTIFF DID NOT FAIL TO EXHAUST HIS ADMINISTRATIVE CLAIMS AND/OR ASSERT HIS RLA CLAIMS IN A TIMELY MANNER, ALL TORT CLAIMS ADVANCED BY THE PLAINTIFF SHOULD PREVAIL

The doctrine of preemption does not apply because the Plaintiff *has* exhausted his administrative remedies and has pleaded all claims in a timely manner. In *Higgens v. Newhouse*, 914 F.2d 256, (6th Cir. 1990), cited by defense counsel, the Plaintiff, 1) never even filed a grievance, and 2) the Defendant Northwest Airlines was/is still in business - unlike EAL, thus *Higgens* is distinguishable on its facts.

IV. DEFENDANTS WILLIAMS AND HENRY ACTED AS MCDONNELL'S "EMPLOYER" AT TIMES PERTINENT HEREIN AND THUS WERE GUILTY OF NEGLIGENTLY RETAINING MCDONNELL AS A SUPERVISOR AT EAL.

The definition of "employer" includes supervisory personnel such as the Defendants. 29 U.S.C. §152 states, "The tern "employer" includes any person acting as an agent of an employer, directly or indirectly . . ." *See also Alabama Highway Express, Inc. v. Local 612, Etc.*, 108 So.2d 350 (Ala. 1959) where the court held,

> The National Labor Relations Board applies the common-law "right of control" test in determining whether an individual is an independent contractor or an employee under the Act. "Under this test, an employer-employee relationship exists where the person for whom the services are performed reserves the right to control not only the end to be achieved but also the means to be used in reaching such end. The resolution of this question depends on the facts of each case and no one factor is determinative." *Oklahoma Trailer Convoy, Inc.*, 99 N.L.R.B. 1019.

Control is the critical factor; Williams as Manager had control over Henry who was a General Foreman and McDonnell who was a Foreman. Likewise Henry - as a General Foreman - had control over McDonnell who was a Foreman under Henry. Williams - even though asserts he only met the Plaintiff four (4) days before terminating him - was duly notified about McDonnell's erratic behavior, prior to terminating the Plaintiff. Contrary to the assertions of defense counsel, depositions have evinced that Williams had absolute authority to fire without the consent of Labor Relations and/or upper management at EAL.

V. WILLIAMS ALSO ACTED AS AN "EMPLOYER" FOR THE PLAINTIFF AT TIMES PERTINENT HEREIN AND IS THUS LIABLE FOR WRONGFUL DISCHARGE OF THE PLAINTIFF UNDER FLA. STAT. §440.205 (1987)

Defendants' claim that Williams - who served as a Manager - was not a person, "carrying on" employment under §440.02(13) (sic)[2] Fla. Stat. (1987). The plain meaning of this definition includes defendant Williams. As stated in the previous paragraph, Williams had the right to fire and/or discipline those employees underneath him which included the Henry, McDonnell and the Plaintiff. Defense counsel mis-quotes Plaintiff's testimony at page 497. The questions referred to are leading and argumentative; and Plaintiff objects to the accuracy of the transcript.

Defense counsel's argument that the Plaintiff does not allege that he had a valid claim for compensation or ever attempted to claim compensation under the Worker's Compensation Act, as required by the plain language of the statute, is frivolous, the Plaintiff has pleaded the essential facts in ¶100 of his complaint. Plaintiff simply attempted to comply with Fla. Stat. §440.185(1) (1987), wherein an employee is expected to give notice of his injury within thirty (30) days of its infliction. As a result of filing said notice, however, Pliaintiff was terminated by Defendant Williams.

Attorney's fees: Defense counsel cited *Munsey v. General Tel. Co.*, 538 So.2d 1328 (Fla. 2d DCA 1989) which was a sex discrimination case. *Munsey* is hardly analogous

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[2]Jeez, same mistake they made in their motion to dismiss. I called it to their attention last time around . . . you think they might have corrected it by now.

to the case at bar, which involves a conspiracy between the Defendants to discharge the Plaintiff from EAL, *protected by* Fla. Stat. §448.045 (1987) and unpaid wages, *protected by* Fla. Stat. §448.08 (1987); thus the basis, at least in part, for Plaintiff's wrongful discharge action stems from the General Labor Relations Act §448.01, et. seq., Fla. Stat. (1987). Recovery for attorneys fees is properly allowed under this section.

VI. PLAINTIFF'S COUNT V FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IS RECOGNIZED UNDER FLORIDA LAW – EVEN WHERE THE BASIS OF THE CLAIM IS WRONGFUL DISCHARGE

The cases cited by defense counsel, essentially, do not support their argument that Florida does not recognize an implied covenant of good faith and fair dealing in a claim involving wrongful discharge – at leasst in the factual scenario presented herein by the Plaintiff. Defense counsel's reference to *Kelly v. Gill,* 544 So. 2d 1162 (Fla. 5th DCA 1989) is fatally flawed because the court in *Kelly* found that the discharged plaintiff was terminable at will and not subject to the protection of a contract, such as the AGREEMENT in the instant case. *Muller v. Stromberg Carlson Corp.,* 427 So. 2d 266 (Fla. 2d DCA 1983), also cited, can similarly be dismissed, for the *Muller* court held, "Even though [plaintiff] claims he was hired as a 'permanent' employee, in the absence of an agreement for a particular period of employment his term of employment must be regarded as indefinite and terminable at will." *Id* at 270.

Smith v. Piezo Technology & Professional Administrators, 427 So. 2d 182 (Fla. 1983), cited by defense

counsel, is crucial to this case – but not for the reason advanced by defense counsel. *Smith* held,

> [S]ection 440.205, Florida Statutes (1979), creates a statutory cause of action for a wrongful discharge in retaliation for an employee's pursuit of a worker's compensation claim and such action is not cognizable before a deputy commissioner but rather is cognizable in a court of competent jurisdiction. *Id* at 183

The other two cases cited *Gibbs v. H.J. Heinz Co.*, 536 So. 2d 370 (Fla. 5th DCA 1980) and *McConnell v. Eastern Air Lines, Inc.*, 499 So. 2d 68 (Fla. 3d DCA 1986) also deal with "at will" employment and thus are not applicable to the case at bar. The existence of the AGREEMENT and the fact that the Plaintiff worked for EAL for over 10 years supports that proposition that the Plaintiff could only be discharged for good cause. *See e.g.* Article 15"E" of the AGREEMENT, "Any employee hereunder discharged for cause shall lose all seniority rights with Company. . ." *See also,* Appendix No. 1 of the AGREEMENT, "The Company agrees not to lay off any employee who has completed one (1) year with the Company on the date of ratification." *See also,* Appendix No. 14 of the AGREEMENT wherein a Shop Steward – such as the Plaintiff – could not be discharged without EAL and the IAM first conducting an investigation. Even if the Plaintiff was an at will employee his discharge predicated upon activity or membership in a union – would fall within one of the exceptions to the absolute right to fire "at-will" doctrine. *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722 (2nd DCA Cal. 1980) at 726, *citing Glenn v. Clearman's Golden Cock Inn*, 192 Cal.App.2d 793, 796, 13 Cal.Rptr. 769 (1961). Indeed, "The concept of good faith and fair dealing was first formulated by the California courts in insurance con-

tracts. But it is clear that it has reference to *all* contracts." *Cleary* at 728. There is a "continuing trend toward recognition by the courts and the Legislature of certain implied contract rights to job security, necessary to ensure social stability in our society." *Id* at 729. The *Cleary* court held, that "the longevity of the employee's service, together with the expressed policy of the employer[3], operate as a form of estoppel, precluding any discharge of such an employee by the employer without good cause." *Id.*

Termination of employment after long periods of time, without legal cause, after long years of employment offends the implied-in-law covenant of good faith and fair dealing contained in all contracts. *See e.g. Flanigan v. Prudential Federal Savings & Loan Ass'n, 122 LRRM 2597 (Mont. 1986)* where a bank employee, who had 28 years of service, was awarded $94,170 in economic damages, $100,000 for emotional distress and $1.3 million in punitive damages.

VII. THE DEFENDANTS – AS PARTIES TO THE "AGREEMENT" – HAVE BREACHED CONTRACTUAL REQUIREMENTS AS ASSERTED IN COUNT IV OF PLAINTIFF'S COMPLANT.

The Defendants clearly fall under the definition of "employer" as defined by U.S. Code and by Article 3(B) of the AGREEMENT which states, "It is understood and agreed that when this Agreement is accepted by the parties and signed *by their authorized representatives,* it will supersede any and all agreements." The Defendants

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[3]That policy – similar to the AGREEMENT – enunciated specific procedures for adjudicating employee disputes such as this one.

were authorized representatives/agents of EAL, and were bound to comply with the terms of the Agreement, *see* Preamble of Agreement.

It is plain that the defendants are parties to EAL-IAM agreement. Plaintiff's complant clearly states the positions held by each defendant. *See* ¶ ¶ 4-6. These defendants had an obligation in law and equity to uphold the provisions of the Agreement. The Defendants were bound to uphold the spirit and letter of the Agreement to the same extent as was the Plaintiff serving in his capacity as union shop steward.

A. THE DEFENDANTS COMMITTED SEPARATE AND INDEPENDENT TORTS AND THUS THE PLAINTIFF CAN RECOVER PUNITIVE DAMAGES FOR DEFENDANTS' BREACH OF THE "AGREEMENT" CONTRACT.

"There is authority in Florida to support recovery of punitive damages in an action based on breach of contract where the breach is 'attended by some intentional wrong, insult, abuse or gross negligence which amounts to an independent tort' ". *Rolls v. Bliss & Nyitray, Inc.*, 408 So. 2d 229, 237 (Fla. 3rd DCA 1981) *citing Griffith v. Shamrock Village, Inc.*, 94 So.2d 854, 858 (Fla. 1957); *Nicholas v. Miami Burglar Alarm Co. Inc.*, 339 So.2d 175 (Fla. 1976). Plaintiff has alleged separate and independent torts in Count I (Battery), Count III (Wrongful Discharge), Count IV (Negligence per se – Unfair Labor Practices), Count V (Breach of Implied Covenant of Good Faith and Fair Dealing), Count VII (Failure to protect evidence for Plaintiff's Benefit), Count VIII (Malicious Prosecution) and Count IX (Conspiracy).

VIII. THE PLAINTIFF HAS ESTABLISHED ALL NECESSARY ELEMENTS TO MAINTAIN AN ACTION FOR "FAILURE TO PROTECT EVIDENCE FOR PLAINTIFF'S BENEFIT" UNDER FLORIDA LAW

The necessary elements as stated by defense counsel: 1) the arbitration concerning the written reprimands surrounding work done by the Plaintiff on forklift #4649, subsequent referral to said written reprimands by McDonnell on 10/23/1986 and indirect reference to these letters in Williams' termination letter; 2) Defendants' contractual duty to supply and preserve the documents in question (GEARS for forklift #4649) is covered by Article 17 – Step 3(G) of the Agreement which states, "Upon proper request to the company official in charge, Union Representatives will be given copies of relevant Company records pertaining to employees covered hereunder when necessary for the processing and investigation of grievances."; 3) said GEARS were under the dominion and control of the Defendants, who "lost" them after refusing to let the Plaintiff copy said records for preparation of his grievance; 4) & 5) inability to counter and refut numerous lies advanced by the Defendants – because of the Defendants' refusal to allow copying – significantly impaired the Plaintiff's case at arbitration – 6) this is evidenced by the Arbitrator's negative findings in that case. Plaintiff's ability to substantiate harassment by Henry, at trial in the case at bar, will be significantly impaired as a result of the "disappearance" of the pertinent GEARS.

IX. PLAINTIFF'S CLAIMS FOR PUNITIVE DAMAGES:

Punitive damages are awarded to serve as a warning and an example to deter others from similar misconduct. In a retaliatory discharge action, punitive damages may be awarded if the employer's conduct was wanton, wilful, or malicious. *McClung v. Marion County Comm'n,* 360 S.E.2d 221 (W. Va. 1987) Punitive damages are awardable where a breach of contract is accompanied by an independent malicious or wanton tort. In *Leggett v. First Interstate Bank,* 86 Or. App. 523, 739 P.2d 1083 (1987) punitive damages were held proper where there was an invasion of privacy. Compare this to McDonnell's admitted Battery on the Plaintiff in the bathroom of the GSE shop at EAL. *Kelsay v. Motorola, Inc.,* 74 Ill. 2d 172 (1978) described a standard for punitive damages, "It has long been established . . . that punitive damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression or when the defendant acts willfully or with gross negligence as to indicate wanton disregard of the rights of others. *Id* at 186. In *Kelsay,* the plaintiff's action for wrongful discharge was permitted where the plaintiff alleged that the discharge was in retaliation for filing a workers' compensation claim. *See also Motsch v. Pine Roofing Co.,* 178 Ill. App. 3rd 169 (1988). The court observed that the retaliatory discharge "mocks the public policy of this state." *Kelsay* at 187.

X. CONSPIRACY:

Since the taking of the Plaintiff's deposition, Plaintiff has been able to contact several witnesses who have agreed to testify at trial concerning the Defendants' conspiracy to terminate the Plaintiff's employment at EAL.

What the Plaintiff's deposition testimony indicates is that the Plaintiff has not uncovered, yet, any written documentation, that specifically supports Plaintiff's conspiracy count. However, this is not necessary for the conspiracy count to advance to the jury. A conspiracy may be proved by circumstantial evidence. This is evidence of one fact, or of a set of facts, from which the existence of the fact to be determined may reasonably be inferred. *Dixon v. Gaso Pump & Burner Manuf. Co.*, 183 Okla. 249, 80 P.2d 678 (1937). It involves, in addition to the assertion of witnesses as to what they have observed, a process of reasoning, or inference, by which a conclusion is drawn. Plaintiff's witness, Neil Feger, has signed a statement in support of the Plaintiff's conspiracy count. (Attached as Exhibit "A"). Thus there is sufficient evidence for this Court to go to trial.

Stringfellow v. Breidegam, 138 So.2d 75, 76 (Fla. 3rd DCA 1962) is a two paragraph holding which hardly supports the conspiracy guidelines asserted by defense counsel. Where the complaint sought to imply a conspiracy from the discharge of the plaintiff who was employed for an indefinite term, the court held that such a discharge was not prima facie illegal, and stated further that allegations purporting to state a cause of action in conspiracy must be clear, positive and specific. *Id.*

There are two (2) exceptions to the limitation advanced by defense counsel – that corporate agents (such as the Defendants acting as supervisors) constitute one single mind and are therefore legally incapable of conspiracy. One is that the agents must be acting within the scope of their employment. *Baker v. McDonald's Corp.*, 686 F. Supp 1474, 1479 (S.D. Fla. 1987), aff'd 865 F.2d

1272, (11th Cir. 1988). The second is, if agents of one corporation have a personal stake in the activity, apart from that of the corporation, then they may be held to have conspired among themselves. *Buckner v. Lower Florida Keys Hospital Dist.*, 403 So.2d 1025, 1029 (3rd DCA Fla. 1981; cited by the defendants' case of *Bryant Heating & A.C. v. Carrier Corp.*, 597 S. Supp. 1045, 1054 (S.D. Fla. 1984). Whether the various torts committed by the Defendants herein, fall within the above two exceptions is a question for the jury. It is worth noting, however, that no such limitation is mentioned in Fla. Stat. 448.045 (1987). Neither *American Credit Card Tel. v. N.Y. Pay Tel.*, 504 So.2d 486 (Fla. 1st DCA 1987) nor any of the other cases cited by defense counsel deal specifically with Fla. Stat. 448.045. For the above reasons Plaintiff respectfully asks that defense counsel's request for the striking of Count IX be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by first class mail this 12th day of October, 1993, to: Defendants' counsel, Walker and Anania at 100 SE 2nd St., One International Place, Suite 3300, Miami, FL. 33131-2150.

BY: /s/ Bruce Toski
Bruce Toski Plaintiff, pro-se / forma pauperis
2361 S.W. 36 Terrace, Fort Lauderdale, FL
33312-4291
Tel: (305) 583-4191

Exhibit "A"

Feger, Neil H.
15928 Westwind Circle
Sunrise, Florida 33326

October 12, 1993

TO WHOM IT MAY CONCERN:

I was elected Shop Steward in the Ground Service Equipment shop after Bruce Toski was terminated by Ken Williams. It is my opinion that – based on events that I witnesses prior to Mr. Toski's termination – Williams, Henry and McDonnell conspired to terminate Mr. Toski's employment at EAL without just cause. Immediately after replacing Mr. Toski as GSE Shop Steward, the same three (3) individuals began a campaign of harassment directed toward me.

Sincerely,

/s/ Neil H. Feger
Neil H. Feger

APPENDIX E

UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 91-0112-CIV-DAVIS
Magistrate Judge TURNOFF

BRUCE RICHARD TOSKI,

Plaintiff,

v.

WILLIAM J. MCDONNELL, JEFFERSON H. HENRY, and KENDALL G. WILLIAMS,

Defendants.

PLAINTIFF'S OBJECTION TO MAGISTRATE TURNOFF'S REPORT AND RECOMMENDATION RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Plaintiff, BRUCE RICHARD TOSKI (hereinafter "Plaintiff"), pro-se/forma pauperis, hereby files his objection to United States District Magistrate Judge William C. Turnoff's Report and Recommendation, (hereinafter "Report"), concerning the Defendants', WILLIAM J. MCDONNELL, JEFFERSON H. HENRY, and KENDALL G. WILLIAMS (hereinafter collectively referred to as the "Defendants") MOTION FOR SUMMARY JUDGMENT (hereinafter referred to as "Motion") and states as follows:

FACTUAL AND PROCEDURAL BACKGROUND

Magistrate Judge Turnoff – in a footnote – starts out by chastising the Plaintiff, by stating, "Plaintiff's brief, while reaching exactly ten pages, is printed in a typeface so small that it strains the eye to read. This creative word processing violates the spirit, if not the letter, of both the Local Rules and Judge Davis's Order." (Footnote one (1) of Magistrate Turnoff's Report, page 1). The Plaintiff has/had no intention of making his brief difficult for the Court to read, thereby unsettling tempers. Plaintiff – as a pro-se litigant – carefully considered the minimum typeface allowable under the Court rules. At the time Plaintiff considered 10 point type to be the minimum allowed. Plaintiff subsequently has researched all the available law and found no restriction other than a minimum line spacing of 1.5 for District Court. Using this spacing and the 11 point, 10 pitch type specified in the Florida and Federal appellate rules, Plaintiff's brief still came in at 10 pages.

Frankly, the Plaintiff is distressed that Magistrate Turnoff appears to be biased against him. If, as a pro-se litigant, the Plaintiff has not complied with all the written and unwritten ways of this Court, then, of course the Plaintiff is truly apologetic. However, when Magistrate Turnoff takes the "Frank is a Weenie" situation – wherein the Plaintiff admitted to "taking the PA microphone and stating into the microphone "Frank is a Weenie"[1] – and turns it into, "Plaintiff commandeered a microphone in the shop office and yelled "Frank is a weenie" over the public address system". (emphasis added). Plaintiff can only interpret this biased resusci-

[1] As stated in the Defendants' Exhibit "A" (the Transcript to the three day deposition of the Plaintiff, page 173, line 19).

tation to indicate a deep rooted bias on the part of Magistrate Turnoff. Second, Magistrate Turnoff – in footnote three (3) – presumes that the "Frank is a Weenie" button refers to Frank Lorenzo. Although this is possible, the record is devoid of any indication as to which Frank[2] individual – if any – this button refers to. Third, Magistrate Turnoff cites *Nettles v. Wainwright* 677 F.2d 404 (5th Cir. 1982) but fails to adopt its findings in his report. Magistrate Turnoff – at page 10 of the Report – states, that, ". . . the parties may serve and file written objections with the Honorable Edward B. Davis, United States District Judge, within ten (10) days after being served with a copy of this Report and Recommendation." (emphasis added). Based on this wording and the fact that the Plaintiff had already filed his answer/objections to the Defendants' Motion for Summary Judgment, the Plaintiff was not inclined to file an objection to the Report . . . until he read the *Nettles* case. *Nettles* held that failure to file an objection to a Magistrate's recommendation would constitute a waiver of right to appeal the district's order adopting the Magistrate's recommendations. *Id.* at 410. Incredible! *Nettles* qualified their holding by precluding appellate review only when the Magistrate informed parties in the report "that objections must be filed within tens days or further appeal is waived. *Id* at 408 *citing United States v. Walters* 638 F.2d 947, 950 (6th Cir. 1981). *Nettles* suggested that Magistrates include the following language at the conclusion of their Reports:

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[2]Of course Frank Borman was the President of EAL prior to Frank Lorenzo, and additionally there was a Frank Weiss who worked as a mechanic in the GSE shop. Finally, a frankfurter is often referred to as a weenie, and thus the button might not have referred to a human being at all.

> Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal.

The above language was not incorporated into Magistrate Turnoff's Report.

OBJECTIONS TO THE REPORT

The crux of the Report hinges on the author's statement that the ". . . Plaintiff failed to pursue the grievance procedure outlined by the collective bargaining agreement. The failure to exhaust the administrative remedies available to him prevents him from prevailing in this forum" *Report* (pg. 6). The fatal flaw in the Report's conclusion is its total failure to address the U.S. Supreme Court case of *Walker v. Southern Railway Company*, 385 U.S. 196, 87 S.Ct. 365 (1966); *Accord Florida East Coast Railway Company v. Hill*, 233 So.2d 845, 846 (3rd DCA Fla. 1970). The Court in *Walker* held that an employee who accepts his discharge as final – as the Plaintiff has done in the case herein – is not required to exhaust any administrative remedies, and can bring an action at law in the appropriate state court for money damages if the state court recognizes such a claim. *Walker* at 196, 365. *Citing Moore v. Illinois Central Railroad Co.*, 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089 (1941); *Slocum v. Delaware L. & W.R. Co.*, 339 U.S. 239, 244, 70 S.Ct. 577, 579, 94 L.Ed. 795; *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653, 73 S.Ct. 906, 97 L.Ed. 1325. Florida is such a state. *See Allan v. SWF Gulf Coast, Inc.*, 535 So.2d 638 (Fla.App. 1 Dist. 1988), where a plaintiff alleging retaliatory discharge under Fla. Stat. 440.205 was held to have properly filed

his suit in Circuit Court and said filing was not preempted by federal law and the parties' collective bargaining agreement. *See also Smith v. Piezo Technology & Professional Administrators,* 427 So.2d 182 (Fla. 1983); *Southwest Gulfcoast, Inc. v. Allan,* 513 So.2d 219 (Fla. App. 1 Dist. 1987). "Florida does not require exhaustion of administrative remedies in suits of this kind. (wrongful discharge) Quite the contrary, Florida adheres to the 'election of remedy' theory. A discharged employee may contest his discharge and pursue his administrative remedy or he may accept his discharge as final, thereby ceasing to be an employee, and sue for damages for breach of contract". *Ferguson v. Seaboard Air Line Railroad Company,* 400 F.2d 473, 475 (Ct. App. 5th 1968).

Of equal importance is the fact that litigation commenced against Eastern Air Lines (EAL) is corollary, not ancillary to litigation commenced against the Defendants. Although they were aware of litigation between the Plaintiff and EAL, the case at bar is the first instance where the Plaintiff has sued the Defendant.

The Plaintiff does not agree – for several litigable issues – that the Plaintiff "was subject to the collective bargaining agreement in effect between the Union and EAL." *Report* at page 5. Several issues here are outside the realm of arbitration and the power of the arbitrator. Furthermore, Plaintiff never "voluntarily abandoned his grievance for strategic reasons". *Report* at page 5. This statement is patently incorrect. Nothing in the record could possibly lead to such an erroneous conclusion. Plaintiff invoked – properly and in a timely manner – the contractual mechanism for dispute resolution provided in the "Agreement". EAL agreed – without objection – to arbitrate (First) the letters which

had been placed in the Plaintiff's personnel file by the Defendants, and (Second) to arbitrate the termination grievance after conclusion of the first arbitration. That it took one year and a half for the first arbitration to take place was commonplace during the Lorenzo era. At the conclusion of the first "letters" arbitration, the Plaintiff filed a timely appeal for review of the arbitrator's decision. That EAL filed for bankruptcy and stayed the Plaintiff's appeal was beyond the control of the Plaintiff. In actuality, the dispute resolution mechanism of the RLA was fully exhausted on March 4th, 1989 (about one week prior to the bankruptcy filing) when EAL locked out the IAM and the now famous STRIKE began. *See* Judge Edward B. Davis's well thought out decision in *Eastern Air Lines v. Air Line Pilots Ass'n Intern.*, 744 F.Supp. 1140 (S.D. Fla. 1990), *aff'd and remanded,* 920 F.2d 722 (11th Cir. 1990), *cert. denied* 112 S.Ct. 278, 116 L.Ed.2d 229. The Plaintiff's rights, under the collective bargaining agreement (CBA) did not survive the discontinuance of business and termination of operations. *see Plumbers Local 519 Health & Welfare Tr. v. Garcia,* 677 F.Supp. 1554 (S.D. Fla. 1988). Since the RLA provides for compensation of the arbitrators by the Company (EAL) and the Union (IAM), no more System Board arbitration hearings were held subsequent to EAL's bankruptcy filing.[3] Thus by operation of law the Plaintiff's attempt to utilize the administrative remedy provided for under the Agreement and the RLA became a

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[3]It goes without saying that if EAL ever complies with this Court's Order granting the Plaintiff's Motion to Compel Production of Documents, the Plaintiff will be able to provide documentation to this Court supporting this contention. Several witnesses will attest to this fact. I am in the process of trying to obtain verification of same from the IAM.

"dead end" and the Plaintiff was precluded from ever arbitrating his grievance concerning Plaintiff's termination from EAL by Defendant Williams. Additionally, it can be argued, that as of December 31st, 1987,[4] the Agreement, ceased to exist, and was, from that date on, subject to change under the RLA. If the CBA was no longer in effect how could/can the RLA possibly preempt it!?

The Doctrine of exhaustion of remedy under the collective bargaining agreement and the RLA is subject to a number of exceptions for a variety of situations in which doctrinaire application of exhaustion rule would defeat the overall purposes of federal labor relations policy. *Glover v. St. Louis-San Francisco Ry. Co., Ala.*, 89 S.Ct. 548, 551, 393 U.S. 324, 21 L.Ed.2d 519 (1969). Implicit in the statutory scheme is the ultimate right of disputants to self-help.

Where is is clearly shown that the RLA is so obviously violated as to sacrifice or obliterate a right which Congress has created to protect the interest of individuals or the public, or when the suit is primarily for the redress of a completed wrong or to prevent a wrong which will result in irreparable injury to petitioner and not involving the establishment of a guide for future relations between carrier and its employees, or does so only incidentally, a petitioner is not required to exhaust his administrative remedies under the RLA before resorting to the courts *Central of Ga. Ry. Co. v. Culpepper*, 76 S.E. 2d 482, 209 Ga. 844 (1953).

Everyone who joins a union does not give up his civil rights. *Andrews* at 330. The body of law governing

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[4]See page 73 of the Agreement.

the discharge of an employee who does not want or seek reinstatement is not found in customs of the shop or in the collective agreement. *Id* at 329. The Railway Labor Act does not bar courts from adjudicating final discharge cases. *Id Citing Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, 244, 70 S.Ct. 577, 580 (1950). A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. *Id* If a court, in handling such a case must consider some provision of a collective bargaining agreement, its interpreation would of course have no binding effect on future interpretations by the Board. *Id* Finally, an employee seeking damages for reinstatement is normally entitled to a jury trial. *Andrews* at 329. Justice J. Douglas, in his dissent, continues, "The courthouse is the forum for that litigant (one who accepts his discharge as final) and I would never close its door to him, unless the mandate of Congress was clear (in the RLA). Even then I do not see how the Seventh Amendment could be circumvented: 'In Suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved.' " *Id* at 330. Further, "This is a plain, ordinary, common-law suit not dependent on any term or provision os a collective-bargaining agreement. I cannot close the courthouse door to him. Under the First Amendment, as applied to the States by the Fourteenth, he is petitioning the Government 'for redress of grievances' in the traditional manner of suitors at common law; and by the Seventh Amendment is entitled to a jury trial." *Id* at 331. Plaintiff agrees with this argument and objects to the Report in its entirety, since adoption of said report would "close the courthouse door" to the Plaintiff and prevent him from partaking of

the right to a jury trial guaranteed by the Seventh Amendment.

The 6 month "borrowed" statute of limitations does not apply. "When Congress creates a federal cause of action but does not expressly provide an applicable statute of limitations, we assume that Congress intended the courts to adopt the limitation period of an analogous cause of action. Ordinarily, courts have drawn a rule from state law." *Monarch Long Beach Corp. v. Soft Drink Workers,* 762 F.2d 228, 230 (Ct.App. 2nd 1985), *cert. den.* 474 U.S. 1020, 106 S.C. 569 (1985) *citing Johnson v. Railway Express Agency,* 421 U.S. 454, 462-65, 95 S.Ct. 1716, 1721-23, 44 L.Ed.2d 295 (1975), *UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696, 703-04, 86 S.Ct. 1107, 1111-13, 16 L.Ed.2d 192 (1966). "Resort to state law remains the norm for borrowing of limitations periods". *Monarch* at 762, quoting *Del Costello,* 462 U.S. at 171, 103 S.Ct. at 2994. *See also Pruitt v. Carpenters' Local Union No. 225,* 893 F.2d 1216 (11th Cir. 1990).

Plaintiff does not concur that all pertinent issues advanced in the case *sub-judice* are "minor disputes". Further, *Le Boutillier,* advanced by Magistrate Turnoff, is, 1) non binding on this Court, and 2) absolutely distinguishable on the facts. In *Le Boutillier* the plaintiff conceded that the agency shop agreement between his union – the Air Line Pilots Assoc. (ALPA) – and Trans World Airlines (TWA), called for his discharge pursuant to his delinquency in paying service charges to ALPA. *Id* at 885. In fact, the TWA-ALPA agreement allowed for the plaintiff to retain his employment during the pendency of the protest procedure! *Id.* The plaintiff's conclusory assertion that he did not invoke the designated appeal procedure, "because it would have been

futile for him to do so" brought the following reaction from the court,

> "In sum, we find not even a wisp of tenable argument justifying LeBoutillier's utter disregard of the contractual procedure for resolving disputes of the kind his case entails. Because there is in the record no reasonable explanation or excuse for LeBoutillier's total bypass of the labor-management contract's dispute resolution system, the district court's decision granting summary judgment to TWA and ALPA is *Affirmed. Id.*

Plaintiff respectfully requests:

1) Entry of an Order – under Evidence Rule 106 – directing the Defendants to submit into the Court record, a complete copy of any deposition transcripts, which they have, at any time during the course of this case, directed this Court's attention.

2) Oral argument prior to any decision for summary judgment by this Court.

3) Clarification: Does 11 point, 10 pitch type with 1.5 spacing comport with the minimum requirements of this Court?

4) In lieu of oral argument, three weeks from the date with which EAL complies – if ever – with this Courts' Order compelling production of documents per the Plaintiff subpoena, to prepare a proper response to the Defendants' Motion for Summary Judgment and Magistrate Turnoff's Report. This Objection, herein, is admittedly haphazard, due to inability as a pro-se litigant to properly procure, formulate and advance all available counter-arguments in the time allowed . . . For example, Plaintiff has simply not had enough time to delve into the "minor" v. "major" dispute issue advanced by Magis-

trate Turnoff. This complex issue, alone, is worth a brief in itself. Also, time prevented the Plaintiff from fully addressing section II of the Report.

Respectfully submitted,

BY: /s/ Bruce Toski
Bruce Toski
Plaintiff, pro se
2361 S.W. 36 Terrace
Fort Lauderdale, FL
33312-4291
Tel: (305) 583-4191

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by first class mail this 23rd day of November, 1993, to: Defendants' counsel, Walker and Anania at 100 SE 2nd St., One International Place, Suite 3300, Miami, FL. 33131-2150.

BY: /s/ Bruce Toski

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 94-4246

BRUCE RICHARD TOSKI,
Petitioner / Appellant,

v.

WILLIAM J. MCDONNELL,
JEFFERSON H. HENRY
and
KENDALL G. WILLIAMS,
Respondents / Appellees

INITIAL BRIEF
APPELLANT – BRUCE RICHARD TOSKI

DIRECT APPEAL FROM A FINAL ORDER
GRANTING SUMMARY JUDGMENT
IN A CIVIL CASE

BRUCE RICHARD TOSKI
2361 S.W. 36th TERRACE
FORT LAUDERDALE, FL 33312-4291
PHONE: (954) 583-4191
PETITIONER / *PRO-SE*

CERTIFICATE OF INTERESTED PERSONS

Edward B. Davis
United States District Court
Southern District of Florida
300 N. Miami Avenue
Miami, FL 33128-7788

Bruce Richard Toski
Plaintiff - *Pro-se*
2361 S.W. 36th Terrace
Fort Lauderdale, FL 33312-4291

Walker, Bandklayder & Blackwell
Defendants' Law Firm
100 SE 2nd Street
One International Place, Suite 3300
Miami, FL. 33131-2144

/s/ Bruce Richard Toski
Bruce Richard Toski

STATEMENT REGARDING ORAL ARGUMENT

Remand seems entirely appropriate from the plaintiff's point of view. If the Court of Appeals has any hesitation in doing so (remanding the instant case to the District Court) then appellant requests court permission to present oral argument at the earliest opportunity.

The Appellant is not an attorney and is handling this appeal *pro-se*. Defense counsel has propounded so many twisted and false arguments that only oral argument will allow the plaintiff sufficient opportunity to straighten them all out in the eyes of this court.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS . . . . .

STATEMENT REGARDING ORAL ARGUMENT . . . . .

TABLE OF AUTHORITIES . . . . .

STATEMENT REGARDING ADOPTION OF RELATED BRIEFS . . . . .

STATEMENT OF JURISDICTION . . . . .

STATEMENT OF THE ISSUE . . . . .

WHETHER THE DISTRICT COURT ERRED IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT . . . . .

STATEMENT OF THE CASE AND FACTS . . . . .

(I) *Course of Proceedings and Disposition in the Court Below* . . . . .

(ii) *Statement of the Facts* . . . . .

(iii) *Standard of Review* . . . . .

SUMMARY OF THE ARGUMENT . . . . .

ARGUMENT . . . . .

I. **THE DISTRICT COURT ERRED IN FORMULATING AND APPLYING THE LAW WHEN IT GRANTED SUMMARY JUDGMENT, AND ASSERTED THAT THE PLAINTIFF HAD FAILED TO EXHAUST ADMINISTRATIVE REMEDIES. PLAINTIFF HAS EXHAUSTED ALL AVAILABLE ADMINISTRATIVE REMEDIES, NOTWITHSTANDING THE FACT THAT THE PLAINTIFF WAS**

NOT REQUIRED TO AVAIL HIMSELF OF, NOR EXHAUST, SAID ADMINISTRATIVE REMEDIES IN THE FIRST PLACE, PRIOR TO FILING A CIVIL SUIT FOR TORTS COMMITTED BY THE DEFENDANTS. . . . . .

II. PLAINTIFF'S CLAIM FOR RELIEF IN COUNT IV – PARTIALLY BASED ON THE RAILWAY LABOR ACT – IS NOT SUBJECT TO A SIX (6) MONTH STATUTE OF LIMITATIONS "BORROWED" FROM THE NLRA . . . . . .

III. THE FINDING OF THE DISTRICT COURT THAT, "PLAINTIFF'S CLAIMS ARE ALL RELATED TO THE LETTERS OF REPRIMAND, PLAINTIFF'S INTERACTIONS WITH HIS SUPERVISORS, AND HIS EVENTUAL DISMISSAL FROM HIS JOB" IS CLEARLY ERRONEOUS. . . . . .

IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO ALLOW THE PLAINTIFF, EVEN ONE (1) OPPORTUNITY TO AMEND HIS COMPLAINT . . . . . .

V. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO RULE ON PLAINTIFF'S MOTIONS TO PREVENT ANY REFERENCE TO DEPOSITION TRANSCRIPTS . . . . . .

VI. THE DISTRICT COURT ERRED IN APPLICATION OF THE LAW WHEN IT DENIED THE PLAINTIFF'S

APPEAL FOR REVIEW OF MAGISTRATE TURNOFF'S ORDER OF AUGUST 30TH, 1993, WHICH DENIED THE PLAINTIFF'S MOTION TO QUASH NUMEROUS SUBPOENAS WHICH WERE IMPROPERLY SERVED BY THE DEFENDANTS ON PLAINTIFF'S WITNESSES . . . . . .

VII. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT IGNORED THE DEFENDANTS' REFUSAL TO "COME CLEAN" ON THE SIMPLE QUESTION WHETHER EASTERN AIR LINES HAS INDEMNIFIED ANY OF THEM (THE DEFENDANTS), FOR LEGAL EXPENSES ARISING FROM ACTIONS THEY TOOK WHILE SUPERVISORS. FOR EAL TO PAY THE DEFENDANTS LEGAL EXPENSES IN THE CASE *SUB-JUDICE* WOULD CONFLICT WITH PLAINTIFF'S CLAIMS IN THE EASTERN AIR LINES' CHAPTER 7 FILING . . . . . .

VIII. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO ALLOW THE PLAINTIFF THE OPPORTUNITY TO ADDRESS THE COURT FOR ORAL ARGUMENT ON THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT . . . . . .

IX. THE DISTRICT COURT ERRED IN APPLYING THE LAW WHEN IT DENIED, AS MOOT, THE PLAINTIFF'S MOTION TO STRIKE THE

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO MAGISTRATE TURNOFF'S REPORT AND RECOMMENDATION .....

X. **THE DISTRICT COURT ERRED IN APPLYING THE LAW WHEN IT DENIED, AS MOOT, THE PLAINTIFF'S REQUEST TO STRIKE THE DEFENDANTS' ENTIRE "STATEMENT OF UNDISPUTED FACTS" IN THEIR MOTION FOR SUMMARY JUDGMENT** .....

TABLE OF AUTHORITIES

U.S. CONSTITUTION

First Amendment .....

Seventh Amendment.....

ACTS OF CONGRESS

U.S. SUPREME COURT CASES

Allis-Chambers Cop. v. Lueck, 471 U.S. 211, 105 S.Ct. 1911 .....

Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 (1972) .....

Del Costello, 462 U.S. at 171, 103 S.Ct. at 2994(1983).....

EAL v. Air Line Pilots Ass'n., 744 F.Supp. 1140 (S.D. Fla. 1990), aff'd and remanded, 920 F.2d 722 (11th Cir. 1990), cert. denied 112 S.Ct. 278, 116 L.Ed.2d 229 .....

Glover v. St. Louis Ry. Co., 89 S.Ct. 548, 393 U.S. 324, 21 L.Ed.2d 519 (1969). . . . . .

Johnson v. Railway Express, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) . . . . . .

Lingle v. Norge, 408 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988) . . . . . .

Monarch Long Beach Corp. v. Soft Drink Workers, 762 F.2d 228 (Ct.App. 2nd 1985), cert. den. 474 U.S. 1020, 106 S.Ct. 569 (1985) . . . . . .

Moore v. Illinois Central Railroad Co., 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089 (1941) . . . . . .

Slocum v. Delaware L. & W.R. Co., 339 U.S. 239, 244, 70 S.Ct. 577, 579, 94 L.Ed. 795 . . . . . .

Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653, 73 S.Ct. 906, 97 L.Ed. 1325 . . . . . .

UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966) . . . . . .

Walker v. Southern Railway Company, 385 U.S. 196, 87 S.Ct. 365 (1966). . . . . .

U.S. CODE

28 U.S.C. §1291. . . . . .

Rule 32(a)(3)(E) FRCP (1996). . . . . .

FEDERAL COURT OF APPEALS CASES

Carson v. Polley 689 F.2d 562 (CA5th, 1982) . . . . . .

In Hildebrand v. Honeywell, Inc. 622 F2d 179 (CA5th, 1980). . . . . .

Mertens v. Hummell 587 F2d 862 (CA7th, 1978) . . . . . .

Pruitt v. Carpenters' Local Union No. 225, 893 F.2d 1216 (11th Cir. 1990) . . . . . .

FEDERAL RULES and DECISIONS

Fed. R. Civ. P. 15(b) . . . . . .

Rule 106 of the Federal Rules of Evidence . . . . . .

Rule 26(a)(D) . . . . . .

Rule 30(b)(2) FRCP (1993) . . . . . .

DISTRICT COURT CASES

Le Boutillier v. Air Line Pilots Int'l, 778 F.2d 883 (D.C. Cir. 1985) . . . . . .

Plumbers Local 519 Health & Welfare Tr. v. Garcia, 677 F.Supp. 1554 (S.D. Fla. 1988) . . . . . .

STATE SUPREME COURT CASES

Central of Ga. Ry. Co. v. Culpepper, 76 S.E. 2d 482, 209 Ga. 844 (1953) . . . . . .

Smith v. Piezo Technology & Professional Administrators, 427 So.2d 182 (Fla. 1983) . . . . . .

STATE COURT OF APPEALS CASES

Allan v. SWF Gulf Coast, Inc., 535 So.2d 638 (Fla.App. 1 Dist. 1988) . . . . . .

Ferguson v. Seaboard Air Line Railroad Company, 400 F.2d 473, 475 (Ct. App. 5th 1968) . . . . . .

Florida East Coast Railway Company v. Hill, 233 So.2d 845, 846 (3rd DCA Fla. 1970) . . . . . .

Southwest Gulfcoast, Inc. v. Allan, 513 So.2d
219 (Fla. App. 1 Dist. 1987).....

STATEMENT REGARDING ADOPTION OF RELATED BRIEFS

Appellant respectfully requests the adoption of the petitioner's briefs in *Lingle, Walker* and the respondent's brief in *Andrews.* Appellant has not been able to obtain copies at this time, inasmuch as they do not seem to be available on microfiche, CDROM, or on-line services such as Lexis or Westlaw. Appellant will have to obtain these briefs from original counsel for from the Supreme Court's clerk's office. Appellant respectfully requests 10 days to do so.

STATEMENT OF JURISDICTION

This is an appeal from a final order granting summary judgment in a civil case from the district court. Jurisdiction lies under 28 U.S.C. §1291.

STATEMENT OF THE ISSUE

WHETHER THE DISTRICT ERRED IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[1] STATEMENT OF THE CASE AND FACTS

(I) Course of Proceedings and Disposition in the Court Below

Six (6) volumes of docket entries would be extremely burdensome to relate and interpret. Major pertinent docket entries follow: . . .

Plaintiff filed his complaint in Circuit Court on 10/23/1990 (R. 1S-189b).[1] The defendants removed the instant case to federal court on 1/16/91 (R. 1-1). Plaintiff's complaint survived the obligatory Motion to Dismiss filed 1/16/91 (R. 1-1). On 10/23/92 (R. 2-32) and again on 5/24/93 (R. 1S-187XI) the plaintiff filed a Motion for Protective Order concerning burdensome deposition schedules. The Motion also requested court adoption of Rule 30(b)(2) FRCP (1993). On 05/24/93 the defendants' filed a Motion for Permission to File Summary Final Judgment with Memorandum of Law in Excess of Twenty Pages (R. 2-43). Discovery had not [2] been completed at that date and time.[2] On 6/10/93 the plaintiff filed a

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[1] Plaintiff will use the following convention for references to the record: (R. 1-1-1) indicates a reference to Volume I of the record, document number 1, page number 1. Volume 1 of the 1st supplement of the record will be referred to as "1S". The clerk of the court's only reference to the original complant filed in the circuit court is found on page 20 of the docket, wherein the defendants' filed copies of various pleadings filed in circuit court, which the clerk collectively identified as docket entry #189. Additionally the various documents which the plaintiff supplemented to the record – on 11/29/95 – have been collectively designated as docket entry #187 by the clerk. Thus, the complaint will be found, hopefully, at (R. 1S-189b?-*).

[2] *On 8/20/93* Judge Davis (R. 4-101) ordered all parties to complete discovery by September 24th, 1993. A virtual impossibility at the time in light of various refusals by Eastern Air Lines (hereinafter EAL) and the defendants to comply with discovery subpoenas.

Motion for Hearing (R. 2-48) on critical issues such as summary judgment and discovery roadblocks. On 6/11/93 Judge Davis denied (R. 2-49) leave for the defendants to file their over length Motion for Summary Judgment. On 7/2/93 Magistrate Turnoff signed an Order which denied plaintiff's Motion for a Hearing (R. 2-48). On 7/21/93 the plaintiff filed a Motion (R. 3-61), in person, requesting an Ex-Parte Hearing concerning blatant discovery violations of the plaintiff's personnel file by Eastern Air Lines and defense counsel. On 7/21/93 the plaintiff also filed a Motion to Quash (R. 3-62) 25 subpoenas improperly served by the defendants. On 7/27/93 Magistrate Turnoff denied (R. 3-67) plaintiff's application for an Ex-Parte Hearing. On 7/29/93 the plaintiff filed (R. 3-69) a Motion to Stay the Case and another Motion for a Hearing. The defendants filed a second Motion for Summary Judgment on 8/17/93 (R. 4-97). On 8/23/93 the plaintiff filed (R. 4-104) a Motion for Leave to Amend and Supplement his Complaint. On 8/26/93 Magistrate Turnoff signed an Order (R. 4-114) which (a) deferred ruling on plaintiff's Motion to Stay the case, to Judge Davis; (b) granted defendants' Motion to Compel Production of Documents (R. 3-73); and 3) denied plaintiff's Motions to Quash (subpoenas) (R. 3-72). On 9/15/93 plaintiff requested (R. 5-136) additional time to respond to defendants' Motion for Summary Judgment. On 10/28/93 (R. 6-168) Magistrate Turnoff recommended that plaintiff's Motion for Leave to [3] Amend and Supplement the Complaint be denied. On 11/10/93 Magistrate Turnoff recommended (R. 6-174) that the defendants' Motion for Summary Judgment be granted. On 11/22/93 the plaintiff filed (R. 6-175) Objections to Magistrate Turnoff's Report and Recommendation. On 12/03/93 the defendants filed their reply (R.-6-176) to the plaintiff's Objections. On 12/7/93 the plaintiff filed a Motion to Strike (R. 6-177) Defendants' Memor-

andum of Law in Opposition to Plaintiff's Objection to Magistrate Turnoff's Report and Recommendation. On 12/9/93 the defendants filed (R. 6-178) a Memo Opposing Plaintiff's Motion to Strike. On 2/1/94 Judge Davis signed an Order (R. 6-179) granting the defendants' Motion for Summary Judgment. On 2/25/94 the Plaintiff filed a Notice of Appeal (R. 6-180) in reference to the granting of the Motion for Summary Judgment. On 4/20/94 the defendants' filed a Motion (no docket entry)[3] to Dismiss the plaintiff's appeal. On 4/28/94 the plaintiff filed (no docket entry) a Response to Appellees' Motion to Dismiss the Appeal and a Motion for Oral Argument. On 12/27/94 the plaintiff filed his First Notice (no docket entry) of Errors and Omissions in the Record. On 1/3/95 the Court of Appeals granted (no docket entry) the plaintiff's Motion for Extension of Time (construed as a motion to stay proceedings) and directs appellant to file monthly status reports. On 5/11/95 the District Court files an Order (no docket [4] entry) in response to plaintiff's Notice of Errors and Omissions in the Record. On 11/25/95 the plaintiff filed a Motion (R. 1S-187) to Supplement the Record on Appeal. On 12/4/95 Judge Davis signs an Order (R. 1S-188) granting plaintiff's Motion to Supplement the Record. On 1/3/96 the defendants file a Notice of Compliance (R. 1S-189) with Judge Davis's 12/4/95 Order. On 4/4/96 the 11th Circuit Court of Appeals denies any further extension of time for the plaintiff to amend and supplement the record and orders plaintiff to file brief within

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[3] **Plaintiff was only about halfway through correcting and supplementing the record when ordered by the appellate court to submit a brief. If given additional time these missing entries would have been noted and appropriate motions to supplement the record would have taken place. Plaintiff has included, what he believes to be, a complete docket, in the appendix.**

10 days. On 4/15/96 the plaintiff/appellant submits his brief to this court (no docket entry).

(ii) Statement of the Facts

Plaintiff began working at Eastern Air Lines (EAL) in 1976 and throughout his ten (10) years (1976-1986) of service, plaintiff received many commendation letters. However when plaintiff began working in the Ground Service Equipment (hereinafter GSE) shop, plaintiff became the subject of harassment; first by defendant Henry, then defendant McDonnell and finally, by defendant Williams. Said harassment by the defendants increased exponentially after Frank Lorenzo took over in 1986. In October of 1986 plaintiff was elected to the position of Shop Steward in the auto-GSE shop. Approximately one week later, defendant McDonnell attacked the plaintiff in the men's bathroom while attempting to serve plaintiff with but one more of McDonnell's disciplinary letters which McDonnell was using to build a constructive discharge. Initially management apologized for McDonnell's horrendous attack. However, only one day after plaintiff reported the attack by McDonnell to the medical department, Williams terminated the plaintiff. the termination letter made several references to the attack by [5] McDonnell. Williams confiscated the plaintiff's airport base pass and employee badge. Within one week of said termination by the defendants, plaintiff filed to have said termination heard by the System Board of Appeals—an arbitration arena available *at the time* to settle those types of matters. Before plaintiff was able to bring the termination grievance to a conclusion, EAL—in 1989—filed for bankruptcy, and ***all*** grievances pending before the System Board of Appeals were stayed and rendered moot by operation of law. Subsequently, in 1990, the plaintiff filed a complaint in state court against the

three defendants who conspired to terminate his employment at EAL. In this nine (9) count complaint, plaintiff sued defendant McDonnell for battery, defendants McDonnell and Williams for failing to protect evidence, defendant Williams for wrongful discharge, defendants Henry and Williams for Negligent Retention (of McDonnell), and sued all three defendants collectively for Unfair Labor Practices, Breach of Implied Covenant of Good Faith and Fair Dealing, Breach of Contract, and Conspiracy. After having his case removed to the Federal Court System simply because of one counts' reference to the Railway Labor Act, the plaintiff—in debt, alone and *pro se*—successfully endured through a Motion to Dismiss and several years of oppressive discovery by defense counsel.

More torts were committed by the defendants subsequent to the filing of the complaint. First, defendant Williams—by confiscating the plaintiff's airport base pass—prevented the plaintiff—as a Shop Steward—from representing the GSE employees who duly elected him. The plain wording of the Railway Labor Act (RLA), 45 United States Code §152 (Third) (1986) states, "Representatives . . . need not be persons in the employ of the carrier . . ." Plaintiff [6] attempted to obtain a temporary restraining order (TRO) against Williams and EAL but was unsuccessful. By the time the plaintiff had a handle on the legal process (as a lone pro-se litigant), the union had gone on strike and rendered the application for a TRO unnecessary. Second, counsel for the defense persuaded one of their court reporters to produce an affidavit (R. 3-58-ExhA-5) which contained several absolutely false accusations and slanderous statements, conjured up purely to make the plaintiff appear offensive in the eyes of the court. The same court reporter's office worked hand in hand with defense counsel to prevent

easy and timely access to the numerous transcripts of depositions that had taken place. Finally, while plaintiff's subpoena was pending for production of documents at EAL, plaintiff's ***personnel file*** was given to counsel for the defendants. Please note, not a *copy* but the ***original***. This, despite no subpoena ever being issued by the defendants and despite the fact that one ***was*** pending which was properly served by the plaintiff. In fact, when the plaintiff appeared at EAL to view his personnel file it was no-where to be found—despite adequate notice of appearance to review same. Plaintiff requested a hearing on this miscarriage, said hearing was denied.

Plaintiff plodded this long road until 1994, when, just as the plaintiff was hoping to finally have his day in court, Judge Davis suddenly granted Summary Final Judgment to the Defendants and quashed Plaintiff's hopes for any timely? justice. Plaintiff filed a timely appeal and attempted to continue the *forma-pauperis* status granted by the District Court. For some reason the District Court felt, all of a sudden, that the plaintiff was not "indigent" and refused to allow plaintiff to continue *in forma pauperis* status on appeal. Plaintiff tried to re-attain *in forma* [7] *pauperis* status with appeals to the Court of Appeals and to the Supreme Court. Neither appeal was fruitful. Plaintiff made two attempts to amend and supplement the record before being ordered to file his brief, which brings us to the present state of affairs.

(iii) Standard of Review

The standard of review for the main issue presented in this case is that the district court erred in formulating or applying a rule of law. In several instances findings of fact by the district court are clearly erroneous. In at least one instance the district court abused its discretion.

[8] SUMMARY OF THE ARGUMENT

Plaintiff has provided ample facts and law for a determination that trial court is the proper tribunal, not some non-existent arbitration arena. The trial court's logic is absolutely inequitable. For if the plaintiff is not allowed to seek a forum in state or federal court, then where does the plaintiff's remedy lie? There is no CBA or arbitration tribunal, there has been none since EAL declared bankruptcy in 1989. At all times pertinent herein, plaintiff has accepted his discharge as final. The Supreme Court has clearly indicated that under circumstances similar to those of the case *sub-judice*, a plaintiff may elect to seek redress in state circuit court or federal court. For the trial court to allow this case to go on for several years and then to grant summary judgment on the weak argument of "failure to exhaust administrative remedies" is truly unfathomable to the plaintiff.

[9] ARGUMENT

The District Court erred when it granted the defendants' motion for summary judgment. This court should reverse and remand to the district court for further proceedings consistent with equity and justice.

I. THE DISTRICT COURT ERRED IN FORMULATING AND APPLYING THE LAW WHEN IT GRANTED SUMMARY JUDGMENT, AND ASSERTED THAT THE PLAINTIFF HAD FAILED TO EXHAUST ADMINISTRATIVE REMEDIES. PLAINTIFF HAS EXHAUSTED ALL AVAILABLE ADMINISTRATIVE REMEDIES, NOTWITHSTANDING THE FACT THAT THE PLAINTIFF WAS NOT REQUIRED TO

AVAIL HIMSELF OF, NOR EXHAUST, SAID ADMINISTRATIVE REMEDIES IN THE FIRST PLACE, PRIOR TO FILING A CIVIL SUIT FOR TORTS COMMITTED BY THE DEFENDANTS.

Resolution of the main issue here hinges on district court Magistrate Turnoff's statement that the ". . . Plaintiff's failure to exhaust his remedies under the collective bargaining agreement in effect at his termination operates to bar his entire suit." (R. 6-174-5). The fatal flaw in the Report's conclusion is its total failure to address relevant U.S. Supreme Court decisions which impact directly on the case *sub-judice*. With facts virtually identical to the instant case, the petitioner in *Lingle v. Norge*, 408 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988) notified her boss that she had been injured in the course of her employment and was subsequently terminated for filing an allegedly false worker's compensation claim. She filed a grievance pursuant to a collective bargaining agreement (hereinafter CBA). While said arbitration was proceeding, petitioner filed a retaliatory discharge action in state court, alleging that she had been discharged for exercising her rights under worker's compensation laws. Said [10] case was removed to federal court for diversity reasons. On a motion to dismiss, the trial court dismissed her claim as pre-empted by the CBA process. The Court of Appeals affirmed. A ***unanimous*** opinion from the Supreme Court ***reversed*** the judgment of the Court of Appeals. To resolve the conflict among the Circuits, the Court made clear once and for all that, ". . . an application of state law is pre-empted by [federal law] only if such application requires the interpretation of a collective-bargaining agreement." *Id* at 413. The district court in the instant case, like *Lingle*, was not, and will not be ***required***, to interpret a CBA in order to resolve the plain-

tiff's claim of retaliatory discharge for filing a claim of an injury received while on the job. That the court may refer to a CBA to determine damages would not automatically invoke any pre-emption process. *Lingle* stated, ". . . as a general proposition, a state-law claim may depend for its resolution upon the interpretation of a collective bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted. As we said in *Allis-Chambers Cop. v. Lueck,* 471 U.S., at 211, 105 S.Ct., at 1911, 'not every dispute . . . tangentially involving a provision of a collective-bargaining agreement, is pre-empted by [federal law]. . .' " *Lingle* in footnote 12, page 413.

The trial court, likewise, never addressed the U.S. Supreme Court case of *Walker v. Southern Railway Company,* 385 U.S. 196, 87 S.Ct. 365 (1966) advanced by the plaintiff in his response (R. 5-162-3) to the defendants' motion for summary judgment (R. 4-97-7). The Court in *Walker* held that an employee who accepts his discharge as final—as the Plaintiff has done in [11] the case herein—is not required to exhaust any administrative remedies, and can bring an action at law in the appropriate state court for money damages if the state court recognizes such a claim *Walker* at 196, 365; *Citing Moore v. Illinois Central Railroad Co.,* 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089 (1941); *Slocum v. Delaware L. & W.R. Co.,* 339 U.S. 239, 244, 70 S.Ct. 577, 579, 94 L.Ed. 795; *Transcontinental & Western Air, Inc. v. Koppal,* 345 U.S. 653, 73 S.Ct. 906, 97 L.Ed. 1325.

Florida *is* a state that recognizes the right of an individual to seek redress in state circuit court for alleged retaliatory discharge for filing a worker's compensation claim.

See Allan v. SWF Gulf Coast, Inc., 535 So.2d 638 (Fla. App. 1 Dist. 1988), where a plaintiff alleging retaliatory discharge under Fla. Stat. §440.205 was held to have properly filed his suit in Circuit Court and said filing was not preempted by federal law and the parties' collective bargaining agreement. *See also Smith v. Piezo Technology & Professional Administrators*, 427 So.2d 182 (Fla. 1983); *Southwest Gulfcoast, Inc. v. Allan*, 513 So.2d 219 (Fla. App. 1 Dist. 1987). "Regardless of what state law may be as to exhaustion of remedies in other areas, Florida does not require exhaustion of administrative remedies in suits of this kind. (wrongful discharge) Quite the contrary, Florida adheres to the 'election of remedy' theory. A discharged employee may contest his discharge and pursue his administrative remedy or he may accept his discharge as final, thereby ceasing to be an employee, and sue for damages for breach of contract". *Ferguson v. Seaboard Air Line Railroad Company*, 400 F.2d 473, 475 (Ct. App. 5th 1968). In accord with this line of reasoning is *Florida East Coast Railway Company v. Hill*, 233 So.2d [12] 845, 846 (3rd DCA Fla. 1970) which stated, "We do not construe the Amendment (RLA) to be such as to make the remedies available therein the exclusive remedy for an allegedly wrongfully discharged employee to determine his rights. *Id* at 846, *Walker v. Southern Railway Company*, 385 U.S. 196, 87 S.Ct. 365, 17 L.Ed.2d 294.

The Plaintiff does ***not*** agree—for several litigable issues —that the Plaintiff "was subject to the collective bargaining agreement in effect between the Union and EAL." (R. 6-174-5). Several issues here are outside the realm of arbitration and the power of the arbitrator. Furthermore, Plaintiff never "voluntarily abandoned his grievance for strategic reasons" (R. 6-174-5). This statement is patently incorrect. Nothing in the record could possibly lead to

such an erroneous conclusion. Plaintiff invoked–properly and in a timely manner–the contractual mechanism for dispute resolution provided in the "Agreement". EAL agreed–***without objction***–to arbitrate (First) the letters which had been placed in the Plaintiff's personnel file by the Defendants, and (Second) to arbitrate the termination grievance after conclusion of the first arbitration. That it took one year and a half for the first arbitration to take place was commonplace during the Lorenzo era and was absolutely beyond the plaintiff's control. At the conclusion of the first "letters" arbitration, the Plaintiff filed a timely appeal for review of the arbitrator's decision. That EAL filed for bankruptcy and stayed the Plaintiff's appeal was beyond the control of the Plaintiff. In actuality, the dispute resolution mechanism of the RLA was fully exhausted on March 4th, 1989 (about one week prior to the bankruptcy filing) when EAL locked out the IAM and the now famous STRIKE began. *See* Judge Edward B. Davis's well thought out [13] decision in *Eastern Air Lines v. Air Line Pilots Ass'n Intern.*, 744 F.Supp. 1140 (S.D. Fla. 1990), *aff'd and remanded,* 920 F.2d 722 (11th Cir. 1990), *cert. denied* 112 S.Ct. 278, 116 L.Ed.2d 229. The Plaintiff's rights, under the collective bargaining agreement (CBA) did not survive the discontinuance of business and termination of operations. *See Plumbers Local 519 Health & Welfare Tr. v. Garcia,* 677 F.Supp 1554 (S.D. Fla. 1988). Since the RLA provides for compensation of the arbitrators by the Company (EAL) and the Union (IAM), no more System Board arbitration hearings were held subsequent to EAL's bankruptcy filing.[4] Thus by operation of law the Plaintiff's attempt to

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[4]It goes without saying that if EAL ever complies with this Court's Order granting the Plaintiff's Motion to Compel Production of Documents, the Plaintiff will be able to provide documentation to this Court supporting this contention.

utilize the administrative remedy provided for under the Agreement and the RLA became a "dead end" and the plaintiff was precluded from ever arbitrating his grievance concerning plaintiff's termination from EAL by Defendant Williams. Additionally, it can be argued, that as of December 31st, 1987,[5] the Agreement, ceased to exist, and was, from that date on, subject to change under the RLA. If the CBA was no longer in effect how could/can the RLA possibly preempt it!?

The Doctrine of exhaustion of remedy under the collective bargaining agreement and the RLA is subject to a number of exceptions for a variety of situations in which doctrinaire application of exhaustion rule would defeat the overall purposes of federal labor relations policy. [14] *Glover v. St. Louis-San Francisco Ry. Co., Ala.*, 89 S.Ct. 548, 551, 393 U.S. 324, 21 L.Ed.2d 519 (1969). Implicit in the statutory scheme is the ultimate right of disputants to self-help.

Where it is clearly shown that the RLA is so obviously violated as to sacrifice or obliterate a right which Congress has created to protect the interest of individuals or the public, or when the suit is primarily for the redress of a completed wrong or to prevent a wrong which will result in irreparable injury to petitioner and not involving the establishment of a guide for future relations between carrier and its employees, or does so only incidentally, a petitioner is not required to exhaust his administrative remedies under the RLA before resorting to the courts *Central of Ga. Ry. Co. v. Culpepper,* 76 S.E. 2d 482, 209 Ga. 844 (1953).

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[5]See page 73 of the Agreement between EAL and the IAM.

Everyone who joins a union does not give up his civil rights. *Andrews v. Louisville & Nashville R. co.*, 406 U.S. 320, 330 (1972). The body of law governing the discharge of an employee who does not want or seek reinstatement is not found in customs of the shop or in the collective agreement. *Id* at 329. The Railway Labor Act does not bar courts from adjudicating final discharge cases. *Id Citing Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, 244, 70 S.Ct. 577, 580 (1950). A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. *Id.* If a court, in handling such a case must consider some provision of a collective bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board. *Id.* Finally, an employee seeking damages for reinstatement is normally entitled to a jury trial. *Andrews* at 329. Justice J. [15] Douglas, in his dissent, continues, "The courthouse is the forum for that litigant (one who accepts his discharge as final) and I would never close its door to him, unless the mandate of Congress was clear (in the RLA). Even then I do not see how the Seventh Amendment could be circumvented: 'In Suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved.' " *Id* at 330. Further, "This is a plain, ordinary, common-law suit not dependent on any term or provision of a collective-bargaining agreement. I cannot close the courthouse door to him. Under the First Amendment, as applied to the States by the Fourteenth, he is petitioning the Government 'for redress of grievances' in the traditional manner of suitors at common law; and by the Seventh Amendment is entitled to a jury trial." *Id.* at 331. Plaintiff agrees with this argument and objects

to Magistrate Turnoff's Report in its entirety, since adoption of said report would "close the courthouse door" to the plaintiff and prevent him from partaking of the right to a jury trial guaranteed by the Seventh Amendment.

II. PLAINTIFF'S CLAIM FOR RELIEF IN COUNT IV – PARTIALLY BASED ON THE RAILWAY LABOR ACT – IS NOT SUBJECT TO A SIX (6) MONTH STATUTE OF LIMITATIONS "BORROWED" FROM THE NLRA

The 6 month "borrowed" statute of limitations does not apply. "When Congress creates a federal cause of action but does not expressly provide an applicable statute of limitations, we assume that Congress intended the courts to adopt the limitation period of an analogous cause of action. Ordinarily, courts have drawn a rule from state law." *Monarch Long Beach Corp. v. Soft Drink Workers,* 762 F.2d 228, 230 (Ct. App. 2nd 1985), *cert. den.* 474 U.S. 1020, 106 S.C. 569 (1985) *citing Johnson v. Railway Express Agency,* 421 U.S. 454, 462-65, 95 S.Ct. 1716, 1721- [16] 23, 44 L.Ed.2d 295 (1975), *UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696, 703-04, 86 S.Ct. 1107, 1111-13, 16 L.Ed.2d 192 (1966). "Resort to state law remains the norm for borrowing of limitations periods". *Monarch* at 762, quoting *Del Costello,* 462 U.S. at 171, 103 S.Ct. at 2994 (1983). *See also Pruitt v. Carpenters' Local Union No. 225,* 893 F.2d 1216 (11th Cir. 1990).

Plaintiff does not concur that all pertinent issues advanced in the case *sub-judice* are "minor disputes". Further, *Le Boutillier v. Air Line Pilots Int'l,* 778 F.2d 883 (D.C. Cir. 1985), advanced by Magistrate Turnoff, is, 1) non binding on this Court, and 2) absolutely distinguish-

able on the facts. In *LeBoutillier* the plaintiff *conceded* that the agency shop agreement between his union—the Air Line Pilots Assoc. (ALPA)—and Trans World Airlines (TWA), called for his discharge pursuant to his delinquency in paying service charges to ALPA. *Id* at 885. In fact, the TWA-ALPA agreement allowed for the plaintiff to retain his employment during the pendency of the protest procedure! *Id.* The plaintiff's conclusory assertion that he did not invoke the designated appeal procedure, "because it would have been futile for him to do so" brought the following reaction from the court,

> "In sum, we find not even a wisp of tenable argument justifying LeBoutillier's utter disregard of the contractual procedure for resolving disputes of the king his case entails. Because there is in the record no reasonable explanation or excuse for LeBoutillier's total bypass of the labor-management contract's dispute resolution system, the district court's decision granting summary judgment to TWA and ALPA is *Affirmed. Id.*

[17]

III. THE FINDING OF THE DISTRICT COURT THAT, "PLAINTIFF'S CLAIMS ARE ALL RELATED TO THE LETTERS OF REPRIMAND, PLAINTIFF'S INTERACTIONS WITH HIS SUPERVISORS, AND HIS EVENTUAL DISMISSAL FROM HIS JOB" IS CLEARLY ERRONEOUS

The three (3+) torts committed by the defendants subsequent to the filing of the plaintiff's complaint in Dade County Circuit Court occurred separately from plaintiff's employment at EAL.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO ALLOW THE PLAINTIFF, EVEN ONE (1) OPPORTUNITY TO AMEND HIS COMPLAINT

The plaintiff filed a Motion for Leave to Amend and Supplement Complaint (R. 4-104) on 8/23/1993. In addition to the three (3) torts mentioned previously, a fourth (4) was uncovered through the discovery of documents which will show that the defendants were involved with illicit transactions which interfered with plaintiff's contractual relations with EAL.

Fed. R. Civ. P. 15(b) specifically authorizes the court to amend pleadings - as may be necessary - to cause them to conform to the evidence. Fed. R. Civ. P. 15(a) states that, ". . . leave shall be freely given when justice so requires." A trial court is obligated to act in this spirit, and may not deny such leave without any justifying reason. *Mertens v. Hummell* 587 F2d 862 (CA7th, 1978). In *Hildebrand v. Honeywell, Inc.* 622 F2d 179 (CA5th, 1980), where a case had sat dormant and unprosecuted for two years, and where the plaintiff moved to amend her complaint ***after*** the court designated pre-trial motion cut off date, the court ordered that leave to amend be granted.

In *Carson v. Polley* 689 F.2d 562 (CA5th, 1982) the Court of Appeals overturned a [18] district court decision which denied the plaintiff leave to amend his complaint. *Carson* was a civil rights action for injuries resulting from the alleged use of excessive force during the course of an arrest. The district court had denied leave to file a third amended complaint to include a claim for negligent hiring and supervision on the part of the sheriff-defendant. The court of appeals held this to be an abuse

of discretion, since there was no evidence that the plaintiff could have framed this cause of action at the time of the second amended complaint and thus there was no evidence of unnecessary delay or bad faith, no pretrial order had been entered nor a pretrial conference held at the time of the request, and there would be no prejudice to the defendant in allowing the claim.

On 10/28/1993 Magistrate Turnoff entered an Order (R. 6-168) recommending that the plaintiff's motion for leave to amend his complaint be denied. Upon information and belief Judge Davis never addressed the issue, hence plaintiff was never given leave to amend.

V. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO RULE ON PLAINTIFF'S MOTIONS TO PREVENT ANY REFERENCE TO DEPOSITION TRANSCRIPTS

Plaintiff was unduly prejudiced by defense counsel's constant reference to deposition transcripts that were:

- obtained illegally through improperly served subpoenas
- obtained at cattle call depositions where deponents were unable to obtain or afford benefit of legal counsel [19]
- obtained through misrepresentation and subterfuge

or utilized out of context.

On 5/24/1993 plaintiff filed a Motion for Formal Adoption of F.R.C.P. 30(B)(2) (This important motion was nowhere to be found on the original docket. Plaintiff provided a copy in (R. 1S-187) After failing to rule on plaintiff's motion to prevent any reference to deposition transcripts, Magistrate Turnoff, in a footnote, (R. 6-174-5,6) referred to statements made during the plaintiff's deposition which lasted for more than three days. This,

despite numerous objections which have been filed concerning the impropriety of the manner in which the depositions were conducted, the false affidavit filed by defense counsel concerning same, the refusal of the trial court to allow the plaintiff sufficient time to examine these transcripts, the refusal of defense counsel to provide the deponent with copies of testimony which he was forced to submit to, and the standing objection which has been raised to the use of any of these transcripts based on Rule 30 FRCP quotes of testimony taken out of context. Plaintiff submits that the record is incomplete as to the numerous depositions taken by defense counsel and subsequently mis-quoted in their briefs.

In 1993 Rule 30(b)(2) FRCP stated, "If a party shows that when the party was served . . . the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party." This Rule has been moved over to the present Rule 32(a)(3)(E) FRCP (1996) with minor modifications. Plaintiff requested adoption of this Rule to level the playing field, to wit, neither the plaintiff nor [20] his witnesses were able to afford, or obtain through due diligence, the benefit of counsel at the numerous depositions staged by defense counsel. The District Court never ruled on plaintiff's motion.

Throughout their Motion for Summary Judgment, defense council predictably mis-quoted and/or cited out of context, statements made during the Plaintiff's three (3) day deposition. Defense did this several times in the past when quoting cases and continued the illicit practice with the plaintiff's lengthy deposition transcript. Pursuant to Rule 106 of the Federal Rules of Evidence, Plaintiff requested the entry of an Order compelling the Defen-

dants to file complete copies of all deposition transcripts - which they have had transcribed - with the Clerk of this Court. This was never done. The defendants were never ordered by the court to do so.

VI. **THE DISTRICT COURT ERRED IN APPLICATION OF THE LAW WHEN IT DENIED THE PLAINTIFF'S APPEAL FOR REVIEW OF MAGISTRATE TURNOFF'S ORDER OF AUGUST 30TH, 1993, WHICH DENIED THE PLAINTIFF'S MOTION TO QUASH NUMEROUS SUBPOENAS WHICH WERE IMPROPERLY SERVED BY THE DEFENDANTS ON PLAINTIFF'S WITNESSES**

VII. **THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT IGNORED THE DEFENDANTS' REFUSAL TO "COME CLEAN" ON THE SIMPLE QUESTION WHETHER EASTERN AIR LINES HAS INDEMNIFIED ANY OF THEM (THE DEFENDANTS), FOR LEGAL EXPENSES ARISING FROM ACTIONS THEY TOOK WHILE SUPERVISORS. FOR EAL TO PAY THE DEFENDANTS LEGAL EXPENSES IN THE CASE *SUB-JUDICE* WOULD CONFLICT WITH PLAINTIFF'S CLAIMS IN THE EASTERN AIR LINES' CHAPTER 7 FILING.**

This is a severe conflict of interest on the part of defense counsel and Eastern Air Lines. [21] For Eastern to deny Plaintiff's monetary claims in the bankruptcy court, and at the same time squander said money away to the defendants' legal counsel is Kafkaesque to say the least. Interestingly enough, during the defendants' deposition, defense counsel vehemently admonished the defendants to NOT answer the simple question, "Did

Easter Air Lines offer to indemnify you in deference to your taking on the role of supervisor at Eastern Air Lines.? This, of course, is a valid inquiry under Rule 26(a)(D) of the Federal Rules of Civil Procedure.

VIII. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO ALLOW THE PLAINTIFF THE OPPORTUNITY TO ADDRESS THE COURT FOR ORAL ARGUMENT ON THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

IX. THE DISTRICT COURT ERRED IN APPLYING THE LAW WHEN IT DENIED, AS MOOT, THE PLAINTIFF'S MOTION TO STRIKE THE DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO MAGISTRATE TURNOFF'S REPORT AND RECOMMENDATION

X. THE DISTRICT COURT ERRED IN APPLYING THE LAW WHEN IT DENIED, AS MOOT, THE PLAINTIFF'S REQUEST TO STRIKE THE DEFENDANTS' ENTIRE "STATEMENT OF UNDISPUTED FACTS" IN THEIR MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by first class mail this 15th day of April, 1995, to defendants' counsel at the address listed in the Certificate of Interested Persons.

BY: /s/ Bruce Richard Toski

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO: 94-4246

BRUCE RICHARD TOSKI,
Plaintiff/Appellant,

v.

WILLIAM J. McDONNELL, JEFFERSON H. HENRY
and KENDALL G. WILLIAMS,
Defendants/Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF OF APPELLEES, WILLIAM J.
McDONNELL, JEFFERSON H. HENRY
AND KENDALL G. WILLIAMS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for Appellees, WILLIAM J. McDONNELL, JEFFERSON H. HENRY and KENDALL G. WILLIAMS (collectively "Appellees"), certifies that the following is a complete list of the trial judges, all attorneys, persons, associations of person, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party:

1. Anania, Bandklayder & Blackwell, P.A., attorneys for Appellees;
2. Francis A. Anania, attorney for Appellees;
3. Donald A. Blackwell, attorney for Appellees;
4. Edward B. Davis, United States District Court Judge, Southern District of Florida;
5. Jefferson H. Henry, Defendant-Appellee;
6. M. Catherine Hite, attorney for Appellees;
7. William J. McDonnell, Defendant-Appellee;
8. Richard F. O'Brien, attorney for Appellees;
9. Bruce Richard Toski, Plaintiff-Appellant;
10. William C. Turnoff, United States District Court Magistrate, Southern District of Florida; and
11. Kendall G. Williams, Defendant-Appellee.

CERTIFICATE OF TYPE SIZE AND FONT

In accordance with Rules 28-2(d) and 32-4(1)(b) of the Eleventh Circuit Rules, the Appellees' Answer Brief has been prepared using 10 point type, Courier font, 10 characters per inch.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a)(1) and 11th Cir.R. 34-3(b)(1), oral argument is not warranted because this appeal is frivolous. See Motion to Dismiss the Appeal filed herein on April 21, 1994 by Appellees, at pp. 2-4 (wherein Appellees note that United States District Court Judges C. Clyde Atkins and Edward B. Davis and United States Magistrate Judge William C. Turnoff have reviewed the circumstances surrounding Eastern Airlines, Inc.'s ("EAL") discharge of Appellant, BRUCE RICHARD TOSKI, Plaintiff below ("TOSKI"), in a light most favorable to TOSKI, and repeatedly have held that TOSKI's admitted failure to exhaust his administrative remedies precludes his claims for relief in federal court, as a matter of law). See also Judge Davis' March 9, 1994 Order Denying TOSKI's Motion to Appeal *In Forma Pauperis*, Record Volume 6, Document 182, p. 2[1](wherein Judge Davis found, among other things, that "there has been no demonstration that the issues central to this appeal are debatable").

Moreover, contrary to TOSKI's contention,[2] oral

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[1] Hereinafter, all references to the original record and specific pages therein will be abbreviated as "Vol. ___, Doc. ___, pp. ___."

[2] TOSKI's Brief at p. ii (wherein TOSKI argues that "only oral argument will allow him a sufficient opportunity

argument would not significantly assist the Court in reaching its decision in this appeal, because the facts and legal arguments involved are adequately framed and presented by the parties' appellate briefs, the parties' briefs regarding Appellees' Motion for Summary Final Judgment,[3] United States Magistrate Judge William C. Turnoff's November 10, 1993 Report and Recommendation,[4] the parties' responses thereto and United States District Judge Edward B. Davis' Order Adopting Magistrate's Report and Recommendation and

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to straighten [the legal argument of counsel for Appellees] out in the eyes of this [C]ourt").

[3] See Appellees' August 17, 1993 Motion for Summary Final Judgment and Supporting Memorandum of Law, Vol. 4, Doc. 97; TOSKI's October 12, 1993 Response to Appellees' Motion for Summary Final Judgment, Vol. 5, Doc. 162; and Appellees' October 22, 1993 Reply to TOSKI's Response to Appellees' Motion for Summary Judgment, Vol. 5, Doc. 164.

[4] Vol. 6, Doc. 174.

[5] See TOSKI's November 22, 1993 Objection to Magistrate Turnoff's Report and Recommendation, Vol. 6, Doc. 175 and Appellees' December 2, 1993 Memorandum in Opposition to TOSKI's Objection to Magistrate Turnoff's Report and Recommendation, Vol. 6, Doc. 176.

Granting Summary Judgment.[6] See Fed. R. App. P. 34(a)(3) and 11th Cir.R. 34-3(b)(3). Finally, but no less significantly, allowing oral argument of this meritless appeal, in order for TOSKI to parrot his tired and often repeated arguments, would only serve to further drain litigant and judicial resources and delay the resolution of this case, which has become a ten year ordeal for Appellees.[7]

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[6] Vol. 6, Doc. 179.

[7] TOSKI's underlying wrongful discharge claim arises out of EAL's decision to terminate TOSKI's employment on **November 7, 1986**.

TABLE OF CONTENTS

Cover Page . . . . . .

Certificate of Interested Persons and Corporate Disclosure Statement . . . . . .

Certificate of Type Size and Font . . . . . .

Statement Regarding Oral Argument . . . . . .

Table of Contents . . . . . .

Table of Citations . . . . . .

Statement Regarding Adoption of Briefs of Other Parties . . . . . .

Statement of Jurisdiction . . . . . .

Statement of the Issue . . . . . .

Statement of the Case . . . . . .

I. Course of Proceedings and Dispositions in the Court Below . . . . . .

II. Statement of the Facts . . . . . .

III. Statement of the Standard of Review . . .

Summary of the Argument . . . . . .

Argument and Citations of Authority . . . . . .

I. The district court properly entered summary judgment in Appellees' favor, because there is no genuine issue as to any material fact that TOSKI failed to exhaust the administrative remedies available to him . . . . . .

II. This Court should affirm the district court's entry of summary judgment in Appellees' favor on TOSKI's state law claims, because: (1) TOSKI has not challenged the district court's ruling that those claims are preempted by the RLA; and (2) the three torts that TOSKI claims are not preempted are not at issue in this case . . . . . .

III. There are numerous and substantial other grounds upon which this Court properly could affirm the district court's entry of a summary final judgment in Appellees' favor, all of which were asserted in Appellees' Motion for Summary Final Judgment .

A. The applicable six month statute of limitations bars TOSKI's claim for relief under the RLA . . . . . .

B. Appellees also are entitled to summary judgment on TOSKI's claim for negligent retention, because EAL and not Appellees HENRY or WILLIAMS was McDONNELL's "employer" under Florida law . . . . . .

C. Appellees are entitled to summary judgment on Count III of TOSKI's Complaint, because Appellee WILLIAMS is not an "employer" within the meaning of § 440.02, Fla. Stat. (1989) and, therefore, he cannot be held liable for wrongful discharge, under § 440.205, Fla. Stat. (1987), as a matter of law. . . . . .

D. Appellees are entitled to summary judgment on Count V of TOSKI's Complaint, because Florida does not recognize an implied covenant of good faith and fair dealing in a claim involving wrongful discharge . . . . . .

E. Appellees are entitled to summary judgment on Count VI of TOSKI's Complaint, because they are not parties to the CBA, which forms the basis for TOSKI's breach of contract claim . . . . . .

F. Appellees HENRY and McDONNELL are entitled to summary judgment on TOSKI's claim that they wrongfully destroyed evidence, because TOSKI has not established any of the elements necessary to maintain such an action under Florida law . . . . . .

G. There is no evidence that Appellees acted with the degree of culpability which is required to support a conviction for manslaughter and, therefore, TOSKI's claims for punitive damages are insufficient as a matter of law . . . . . .

H. There is no evidence in the record that Appellees were engaged in a conspiracy and, therefore, Appellees are entitled to judgment, as a matter of law, on Count IX of TOSKI's Complaint . . . . . .

IV. Magistrate Judge Turnoff did not abuse his discretion in recommending that the district court deny TOSKI's August 23, 1993 Motion for Leave to Amend and Supplement [his] Complaint . . . .

V. The district court did not refuse to rule on TOSKI's "Motion for Formal Adoption of F.R.C.P. 30(b)(2)," because TOSKI did not file it with the district court. Moreover, the district court did not refuse "to adopt" Fed. R. Civ. P. 30(b)(2)(1993), which does not afford the relief that TOSKI requested in his Motion . . . . . .

VI. TOSKI did not move the district court to overrule Appellees' objection to deposition questions and, therefore, he did not preserve the issue for appellate review. Furthermore, TOSKI has not shown any basis or even argued that the discovery at issue was relevant to any issue in the case . . .

VII. The remaining issues raised in TOSKI's Brief are waived . . . . . .

Conclusion . . . . . .

Certificate of Service . . . . . .

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CASES

Abramson v. Gonzalez,
949 F.2d 1567 (11th Cir. 1992) . . . . . .

Adams v. Gould, Inc.,
739 F.2d 858 (3d Cir. 1984) . . . . . .

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567 F. Supp. 66 (S.D. Tex. 1983) . . . . . .

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504 So. 2d 486 (Fla. 1st DCA 1987) . . . . . .

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477 U.S. 242 (1986) . . . . . .

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406 U.S. 320 (1972) . . . . . .

Atkins v. Zantop Int'l Airlines,
18 Av. Cas. (CCH), ¶ 18,290 (E.D. Mich. 1984) . . . . . .

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686 F. Supp. 1474 (S.D. Fla. 1987),
aff'd, 865 F.2d 1272 (11th Cir. 1988),
cert. denied, 493 U.S. 812 (1989) . . . . . .

Bennett v. Godfather's Pizza, Inc.,
570 So. 2d 1351 (Fla. 3d DCA 1990) . . . . . .

Blonder-Tongue Lab. Inc. v. University of Ill. Found.,
402 U.S. 313 (1971) . . . . . .

Bonani Ship Supply, Inc. v. United States,
959 F.2d 1558 (11th Cir. 1992) . . . . . .

Bradenton Mall Assocs. v. Hill,
508 So. 2d 538 (Fla. 2d DCA 1987) . . . . . .

Brock v. Republic Airlines, Inc.,
776 F.2d 523 (5th Cir. 1985) . . . . . .

Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co.,
768 F.2d 914 (7th Cir. 1985) . . . . . .

Bryant Heating & A.C. v. Carrier Corp.,
597 F. Supp. 1045 (S.D. Fla. 1984) . . . . . .

Byrd v. Richardson-Greenshield Securities, Inc.,
552 So. 2d 1099 (Fla. 1989) . . . . . .

C.L.-Alexanders Laing & Cruickshank v. Goldfeld,
739 F. Supp. 158 (S.D.N.Y. 1990) . . . . . .

Caceres v. Physicians Protective Trust Fund,
489 So. 2d 869 (Fla. 3d DCA 1986) . . . . . .

Carson v. Polley,
689 F.2d 562 (5th Cir. 1982) . . . . . .

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) . . . . . .

City of Miami v. Fraternal Order of Police Lodge No. 20,
378 So. 2d 20 (Fla. 3d DCA),
cert. denied, 388 So. 2d 1113 (Fla. 1980) .....

Cofield v. City of Atlanta,
648 F.2d 986 (5th Cir. 1981) .....

Como Oil Co. v. O'Laughlin,
466 So. 2d 1061 (Fla. 1985) .....

Continental Ins. Co. v. Herman,
576 So. 2d 313 (Fla. 3d DCA 1991) .....

Datascope Corp. v. SMEC, Inc.,
962 F.2d 1043 (Fed. Cir. 1992) .....

DelCostello v. International Brotherhood of Teamsters,
462 U.S. 151 (1983) .....

Denis v. Liberty Mut. Ins. Co.,
791 F.2d 846 (11th Cir. 1986) .....

Diduck v. Kaszycki & Sons Contractors, Inc.,
737 F. Supp. 792 (S.D.N.Y. 1990), modified
on other grounds, 974 F.2d 290 (2d Cir. 1990) .....

Digioia v. H. Koch & Sons, Div. of Wickes Mfg. Co.,
944 F.2d 809 (11th Cir. 1991) .....

Dorner v. Red Top Cab & Baggage Co.,
37 So. 2d 160 (Fla. 1948) .....

Edward Leasing Corp. v. Uhlig & Assocs.,
785 F.2d 877 (11th Cir. 1986) . . . . . .

Elgin, J. & E. Ry. Co. v. Burley,
325 U.S. 711 (1945) . . . . . .

Executive Leasing Corp. v. Banco Popular de Puerto Rico,
48 F.3d 66 (1st Cir. 1995) . . . . . .

F.D.I.C. v. Verex Assur., Inc.,
3 F.3d 391 (11th Cir. 1993) . . . . . .

Fleming v. Department of Justice,
1992 U.S. Dist. LEXIS 9753, *5 (N.D.N.Y. 1992) . . . .

Foman v. Davis,
371 U.S. 178 (1962) . . . . . .

Garcia v. Duffy,
492 So. 2d 435 (Fla. 2d DCA 1986) . . . . . .

Gibbs v. H.J. Heinz Co.,
536 So. 2d 370 (Fla. 5th DCA 1988) . . . . . .

Gibson v. Resolution Trust Corp.,
51 F.3d 1016 (11th Cir. 1995) . . . . . .

Hann v. Curson,
462 F. Supp. 854 (M.D. Fla. 1978) . . . . . .

Harrison Beverage Co. v. Dribeck Importers, Inc.,
133 F.R.D. 463 (D.N.J. 1990) . . . . . .

Implement Serv., Inc. v. Tecumseh Products, Co.,
726 F. Supp. 1171 (S.D. Ind. 1989) . . . . . .

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868 F.2d 1201 (11th Cir. 1989) . . . . . .

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188 B.R. 56 (S.D. Fla. Bankr. 1994) . . . . . .

Infant Formula Antitrust Litigation, MDL 878 v. Abbott Laboratories, Inc.,
72 F.3d 842 (11th Cir. 1995) . . . . . .

Kelly v. Gill,
544 So. 2d 1162 (Fla. 5th DCA 1989) . . . . . .

Kinion v. Design Systems, Inc.,
641 P.2d 472 (Mont. 1981) . . . . . .

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988 F.2d 120 (9th Cir. 1993) . . . . . .

Le Boutillier v. Airline Pilots Ass'n Int'l,
778 F.2d 883 (D.C. Cir. 1985) . . . . . .

Leonard v. Pan Am. World Airways, Inc.,
905 F.2d 1457 (11th Cir. 1990) . . . . . .

Lewis v. Guthartz,
428 So. 2d 222 (Fla. 1982) . . . . . .

Lingle v. Norge Div. of Magic Chef, Inc.,
486 U.S. 399 (1988) . . . . . .

McCabe v. Sharrett,
12 F.3d 1558 (11th Cir. 1995) . . . . . .

McConnell v. Eastern Airlines, Inc.,
499 So. 2d 68 (Fla. 3d DCA 1986) . . . . . .

Mellencamp v. Riva Music Ltd.,
698 F. Supp. 1154 (S.D.N.Y. 1988) . . . . . .

Miller v. Allstate Ins. Co.,
573 So. 2d 24 (Fla. 3d DCA 1990) . . . . . .

Mitchel v. General Elec. Co.,
689 F.2d 877 (9th Cir. 1982) . . . . . .

Muller v. Stromberg Carlson Corp.,
427 So. 2d 266 (Fla. 2d DCA 1983) . . . . . .

Munsey v. General Tel. Co.,
538 So. 2d 1328 (Fla. 2d DCA 1989) . . . . . .

Novak v. Irwin Yacht & Marine Corp.,
986 F.2d 468 (11th Cir. 1993) . . . . . .

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512 F. Supp. 75 (W.D. Mo. 1991) . . . . . .

Robinson v. Pan Am. World Airways,
777 F.2d 84 (2d Cir. 1985) . . . . . .

Rolls v. Bliss & Nyitray, Inc.,
408 So. 2d 229 (Fla. 3d DCA 1981) . . . . . .

Smith v. Piezo Technology & Professional Adm'rs,
427 So. 2d 182 (Fla. 1983) .....

Stevens v. Braniff Airways, Inc.,
490 F. Supp. 231 (D. Minn. 1980) .....

Stringfellow v. Breidegam,
138 So. 2d 75 (Fla. 3d DCA 1962) .....

Tallahassee Memorial Regional Medical Center v. Bowen,
815 F.2d 1435 (11th Cir. 1987),
cert. denied, 485 U.S. 1020 (1988) .....

Ten Assocs. v. Brunson,
492 So. 2d 1149 (Fla. 3d DCA 1986) .....

Union P. R. Co. v. Sheehan,
439 U.S. 89 (1978) .....

Walker Inv., Inc. v. American Exp. Field Warehousing Corp.,
276 F.2d 591 (5th Cir. 1960) .....

Walker v. Southern Ry. Co.,
385 U.S. 196 (1966) .....

White Constr. Co. v. DuPont,
455 So. 2d 1026 (Fla. 1984) .....

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441 So. 2d 693 (Fla. 1st DCA 1983) .....

Winn & Lovett Grocery Co. v. Archer,
171 So. 214 (Fla. 1936) . . . . . .

STATUTES

28 U.S.C. § 1291 (1982) . . . . . .

28 U.S.C. § 1331 (1980) . . . . . .

29 U.S.C. § 160 (1984) . . . . . .

45 U.S.C. § 151 (1949), *et seq.* . . . . . .

45 U.S.C. § 152 (1948) . . . . . .

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Section 440.205, Fla. Stat. (1987) . . . . . .

Section 448.01, Fla. Stat. (1984), *et seq.* . . . . . .

RULES

Fed. R. App. P. 28 . . . . . .

Fed. R. App. P. 34 . . . . . .

Fed. R. Civ. P. 15 . . . . . .

Fed. R. Civ. P. 30 . . . . . .

Fed. R. Civ. P. 72 .....

11th Cir.R. 28-2 .....

11th Cir.R. 32-4 .....

11th Cir.R. 34-3 .....

S.D. Fla. L.R. 15.1 .....

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Each of the Appellees joins in the filing of this single brief in opposition to TOSKI's appeal and in support of Judge Davis' Order Adopting Magistrate's Report and Recommendation and Granting Summary Judgment.[8]

Appellees request that this Court deny TOSKI's request to adopt the petitioners' briefs in Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) and Walker v. Southern Ry. Co., 385 U.S. 196 (1966), and the respondent's brief in Andrews v. Louisville & Nashville Ry. Co., 406 U.S. 320 (1972),[9] on the grounds that: (1) Fed. R. App. P. 28(i) does not permit a party to adopt the briefs of parties to entirely unrelated cases; and (2) Appellees are unable to respond to any arguments or authorities advanced in these briefs, because TOSKI has not identified in detail which portions of these briefs he is adopting, nor has he attached or, to date, separately served a copy of any of these briefs, which are not published or otherwise available. See TOSKI's Brief, p. x.

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[8] Vol. 6, Doc. 179.

[9] TOSKI's Brief at p. x.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review United States District Judge Edward B. Davis' February 1, 1994 Order[10] Adopting Magistrate's Report and Recommendation[11] and Granting Defendants/Appellees' Motion for Summary Final Judgment,[12] pursuant to 28 U.S.C. § 1291 (1982).

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[10] Vol. 6, Doc. 179.

[11] Vol. 6, Doc. 174.

[12] Vol. 4, Doc. 97.

STATEMENT OF THE ISSUE

Whether the United States District Court for the Southern District of Florida properly determined that the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, establish that there is no genuine issue of any material fact with respect to the claims asserted in TOSKI's Complaint and that Appellees are entitled to summary final judgment in their favor on those claims, as a matter of law.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW.

In 1987, TOSKI filed suit against EAL, WILLIAMS, McDONNELL and others for injunctive relief and damages he allegedly sustained as a result of **EAL's decision to terminate his employment**. See TOSKI's Complaint in Toski v. Lorenzo, et al., Case No. 87-1422-CIV-ATKINS, Vol. 4, Doc. 97, Exhibit F. In that case, United States District Judge Atkins dismissed TOSKI's Complaint, based upon his findings that: (1) TOSKI had not exhaust[ed] his administrative remedies in pursuing his wrongful discharge claim; and (2) TOSKI's claims under the Railway Labor Act constitute 'a minor dispute'. . . and, [therefore,] are subject to the compulsory arbitration procedures of [S]ection 153 [of the Act]." See Order on Application for Temporary Restraining Order, dated August 19, 1987, Vol. 4, Doc. 97, Exhibit G. Eighteen (18) months later, EAL filed a Chapter 11 Bankruptcy Petition, which resulted in a stay of TOSKI's action against EAL. See EAL's Certificate of Commencement of Case, dated March 9, 1989, Vol. 4, Doc. 97, Exhibit H.

Apparently frustrated at his inability to obtain relief against his employer (i.e., EAL) and in a thinly veiled attempt to circumvent the operation of the automatic stay, TOSKI then initiated this action against Appellees, individually, on October 23, 1990, in Florida state court. As originally drafted, TOSKI's nine (9) count Complaint against his co-workers included claims based on battery

(Count I), negligent retention (Count II), wrongful discharge (Count III), unfair labor practices (Count IV), breach of implied covenant of good faith (Count V), breach of contract (Count VI), spoliation of evidence (Count VII), malicious prosecution (Count VIII) and civil conspiracy (Count IX). See TOSKI's Complaint attached to Notice of Removal ("TOSKI's Complaint"), Vol. 1, Doc. 1; Vol. 1 (1st Supp.), Doc. 189. Appellees, in turn, filed a Motion to Dismiss or Strike the Complaint[13] and timely removed the case to the United States District Court for the Southern District of Florida ("district court") based on federal question jurisdiction and pursuant to 28 U.S.C. § 1331 (1980). See Notice of Removal, Vol. 1, Doc. 1; Vol. 1 (1st Supp.), Doc. 189.

After oral argument on Defendants' Motion to Dismiss or Strike the Complaint, Magistrate Judge William C. Turnoff concluded that "each and every claim of [the] Defendants [was] colorable," but noted that "[the majority] of Defendants' arguments [were] more suitable for adjudication on a motion for summary judgment." Report and Recommendation, dated September 20, 1991, Vol. 1, Doc. 20, p. 2. Accordingly, Magistrate Judge Turnoff only recommended that the district court dismiss Count I (battery), as to an alleged April 11, 1986 incident, because it was time-barred, and Count VIII (malicious prosecution). Vol. 1, Doc. 20, p. 2. Based upon the Magistrate Judge Turnoff's Report **and an independent review of the record**, the district court dismissed Counts I and VIII in a November 15, 1992 Order. See Vol. 1, Doc. 21.

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[13] Vol. 1, Docs. 1 and 7.

At the close of discovery, Appellees filed a Motion for Summary Final Judgment in which they argued that: (1) TOSKI's claim for relief under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1949) ("RLA"), is time-barred by the applicable six (6) month statute of limitations; (2) TOSKI's claims under the RLA are barred because TOSKI did not exhaust his administrative remedies prior to filing suit; (3) TOSKI's tort claims are preempted by the RLA; (4) TOSKI's claim for negligent retention is meritless because EAL, and not Defendants HENRY or WILLIAMS, was McDONNELL's "employer" under Florida law; (5) TOSKI's claim for wrongful discharge, under Section 440.205, Fla. Stat. (1987), is deficient because Defendant WILLIAMS was not an "employer," within the meaning of Section 440.02, Fla. Stat. (1987); (6) Florida does not recognize an implied covenant of good faith and fair dealing in a wrongful discharge claim; (7) Appellees were not parties to the Collective Bargaining Agreement between EAL and TOSKI's union, the IAMAW, ("CBA"), which forms the basis for TOSKI's breach of contract claim; (8) TOSKI could not establish any of the elements necessary to maintain an action for wrongful destruction of evidence under Florida law; (9) TOSKI's claims for punitive damages are insufficient, as a matter of law, because there is no evidence that Appellees acted with the degree of culpability required to support a conviction for manslaughter; (10) there is no evidence that Appellees engaged in a conspiracy; and (11) a contractual or statutory basis does not exist for an award of attorney's fees, as required under Florida law. See Vol 4, Doc. 97, pp. 5-19.

Magistrate Judge Turnoff recommended that the district court grant Defendants' August 17, 1993 Motion

for Summary Final Judgment in a November 10, 1993 Report and Recommendation, on the grounds that: (1) TOSKI's "failure to exhaust the administrative remedies available to him prevents him from prevailing in this forum" on his claims under the RLA;[14] and (2) TOSKI's various state law causes of action are preempted by the RLA, because each "arises out of the employment relationship and each is based on a matrix of facts which are inextricably intertwined with the procedures of the collective bargaining agreement and the RLA." Vol. 6, Doc. 174, p. 9. In so holding, Magistrate Judge Turnoff rejected TOSKI's contention that he did not fail to exhaust his administrative remedies, **which was the sole basis of TOSKI's response to Appellees' arguments.**[15] See Id. at pp. 5-7. Magistrate Judge Turnoff did not address the remaining arguments proffered by Appellees in their Motion for Summary Judgment with respect to the separate state law claims, because he found that TOSKI's state law claims were preempted. Id. at p. 10, n. 7.

On February 1, 1994, District Judge Davis adopted Magistrate Judge Turnoff's Report and Recommendation "in its entirety" and granted Summary Final Judgment in favor of the Appellees. Vol. 6, Doc. 179. TOSKI then filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") on **March 1, 1994**, with an Affidavit in Support of his Motion to Proceed on Appeal *In Forma Pauperis*. Vol. 6,

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[14] Vol. 6, Doc. 174, p. 6.

[15] See TOSKI's Response to Appellees' Motion for Summary Final Judgment, Vol. 5, Doc. 162, pp. 3-5.

Docs. 180 and 181. Judge Davis denied TOSKI's Motion to Appeal *In Forma Pauperis* in a March 9, 1994 Order, because, **from an objective standard, TOSKI's appeal was frivolous**. See Vol. 6, Doc. 182. In reaching his decision, Judge Davis noted that "[s]ummary judgment was granted in the [Appellees'] favor largely out of [a] failure by the Plaintiffs (sic) to exhaust his administrative remedies under the [RLA]."[16] Id.

After two (2) years and numerous extensions, this Court issued an Order on April 4, 1996, in which it denied TOSKI's Eleventh Status Report Regarding the Record, construed by the Clerk as a Motion to Further Stay the Briefing Schedule,[17] and ordered TOSKI to file his Brief

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[16] This Court denied TOSKI's April 11, 1992 Rule 24 Motion for Leave to Appeal *In Forma Pauperis* on July 7, 1994, on the grounds that TOSKI did not appear to be indigent, and denied TOSKI's Motion for Reconsideration of the July 7, 1994 Order on September 21, 1994. On March 20, 1995, the Supreme Court denied TOSKI's December 20, 1994 Motion for Leave to Proceed *In Forma Pauperis* in the Supreme Court for purposes of filing a Petition for Writ of Certiorari to review this Court's Orders denying TOSKI leave to appeal *in forma pauperis* in this Court. A copy of the March 20, 1995 correspondence from the Clerk of the Supreme Court is attached hereto as Exhibit A. TOSKI finally paid the filing fees for this appeal on November 8, 1994.

[17] TOSKI filed his "Eleventh Status Report Regarding the Record" on February 13, 1996, **a mere seven (7) days before the Clerk would dismiss his appeal for lack of**

and record excerpts by April 15, 1996 **or face dismissal for lack of prosecution**. TOSKI filed his partially completed Brief on April 15, 1996. However, he did not file the record excerpts by the Court-ordered deadline. Instead, on May 1, 1996, TOSKI filed a Motion to File Record Excerpts Out of Time. Appellees objected to TOSKI's Motion, on the grounds that, by failing to timely file record excerpts, pursuant to this Court's April 4, 1996 Order, TOSKI did not satisfy a mandatory precondition to maintaining his appeal. TOSKI's Motion to File Record Excerpts Out of Time and Appellees' April 20, 1994 Motion to Dismiss the Appeal remain pending before this Court.

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prosecution.

II. STATEMENT OF THE FACTS.[18]

On or about June 21, 1976, EAL hired TOSKI to work as a shop laborer at its Miami facility. See April 21, 1991 Deposition of TOSKI ("TOSKI Deposition"), Vol. 4, Doc. 97, Exhibit A, p. 42. Five (5) years later, EAL promoted TOSKI to the position of mechanic in its Ground Support Equipment Auto Shop ("GSE Shop"). Id. at p. 48. TOSKI remained in the GSE Shop for approximately six (6) weeks, when, as part of a reduction in its work force, EAL laid TOSKI off and reassigned to him to a stock clerk position. Id. On April 24, 1984, EAL recalled TOSKI to the GSE Shop as a line mechanic. Id. at pp. 48 and 49.

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[18] The "facts" contained in the "Statement of the Facts" section of TOSKI's Brief, pp. 4-6, except for TOSKI's term of employment at EAL and his position as Shop Steward, were not presented to the district court in TOSKI's Response to Appellees' Motion for Summary Final Judgment and do not otherwise constitute facts of record in this case. See TOSKI's Response to Appellees' Motion for Summary Final Judgment, Vol. 5, Doc. 162. Moreover, the Court should dismiss TOSKI's appeal because TOSKI's Brief violates Fed. R. App. P. 28(a)(4) in that TOSKI's "Statement of the Facts" does not include any references to the record. See Mitchel v. General Elec. Co., 689 F.2d 877, 879 (9th Cir. 1982); In re Suncoast Airlines, Inc., 188 B.R. 56 (S.D. Fla. Bankr. 1994).

Shortly thereafter and throughout the next 2½ years, TOSKI's supervisors who, at various times, included each of the Appellees, repeatedly experienced problems with TOSKI's job performance and attitude. Those problems included: (1) TOSKI's propensity for performing unnecessary and/or unauthorized work on company vehicles; (2) his repeated violations of EAL's rules and regulations; and (3) his failure to obey the instructions and directives of EAL management personnel. See EAL's Letters of Discipline, Instruction, Reprimand and/or Job Performance, dated November 27, 1984, February 15, 1985, February 28, 1986, April 14, 1986, September 8, 1986, September 11, 1986, October 23, 1986 and October 24, 1986, Vol. 4, Doc. 97, Exhibit B.

Then, on November 7, 1986, Appellees McDONNELL and WILLIAMS determined that TOSKI had falsified a claim for medical benefits in conjunction with an incident that allegedly occurred between TOSKI and Appellee McDONNELL on October 24, 1986. See EAL's Letter of Termination, dated November 7, 1986, Vol. 4, Doc. 97, Exhibit C. Appellees McDONNELL and WILLIAMS, in turn, reported TOSKI's actions to the appropriate EAL Labor Relations personnel and, **on November 7, 1986, EAL terminated TOSKI's employment**. Id. See also Deposition of Peter Blanco, Labor Relations Representative for EAL, Vol. 4, Doc. 97, Exhibit D, pp. 6-8.

Five (5) days later, TOSKI filled out a grievance form relating to his termination. See TOSKI Deposition, Vol. 4, Doc. 97, Exhibit A, pp. 510-511. See also TOSKI's Appeal for Investigation Form, dated November 12, 1986, Vol. 4, Doc. 97, Exhibit E. Articles 17 through 19 of the CBA between EAL and TOSKI's union, the

IAMAW, indisputably governed the filing, prosecution and resolution of such grievances. A copy of the CBA is attached as Exhibit B to Defendants' Memorandum of Law in Support of their Motion to Dismiss or Strike, Vol. 1, Docs. 1 and 7. **Significantly, however, TOSKI made a conscious and strategic decision not to pursue or, in the alternative, to delay his pursuit of that grievance before the System Board of Adjustment** ("SBA"). See TOSKI Deposition, Vol. 4, Doc. 97, Exhibit A, pp. 511-515. As a result, the SBA never even considered, let alone issued a ruling on, TOSKI's grievance. Id. at 515.

III. STATEMENT OF THE STANDARD OF REVIEW.

It is well-settled in the Eleventh Circuit that, in deciding an appeal from the entry of a summary judgment, the appellate court must conduct a *de novo* review of the evidence before the district court, construe that evidence in a light most favorable to the non-moving party, and determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. See Gibson v. Resolution Trust Corp., 51 F.3d 1016, 1020 (11th Cir. 1995)(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986). Only those facts properly before the district court on its consideration of a motion for summary judgment are preserved for appellate review. Denis v. Liberty Mut. Ins. Co., 791 F.2d 846, 849 (11th Cir. 1986). See also Leonard v. Pan Am. World Airways, Inc., 905 F.2d 1457, 1463 (11th Cir. 1990).

Conversely, where there is no dispute with respect

to the material facts, the appellate court need only decide whether the district court correctly applied the law to the facts in granting summary judgment. See, e.g., Digioia v. H. Koch & Sons, Div. of Wickes Mfg. Co., 944 F.2d 809, 811-812 (11th Cir. 1991). Moreover, it is equally well established that, if the judgment is correct, the appellate court must affirm the district court "on any legal grounds regardless of the grounds addressed, adopted or rejected by the district court." See, e.g., Novak v. Irwin Yacht & Marine Corp., 986 F.2d 468, 470 (11th Cir. 1993)(quoting Bonani Ship Supply, Inc. v. United States, 959 F.2d 1558, 1561 (11th Cir. 1992)). See also McCabe v. Sharrett, 12 F.3d 1558, 1560 (11th Cir. 1995)(holding that the district court properly granted summary judgment for the defendant, regardless of the particular test that the district court applied).

It also is well-settled that an appellate court reviews a district court's order denying a plaintiff's motion for leave to amend his complaint and orders regarding discovery under an abuse of discretion standard. See Abramson v. Gonzalez, 949 F.2d 1567, 1581 (11th Cir. 1992); Edward Leasing Corp. v. Uhlig & Assocs., 785 F.2d 877, 882 (11th Cir. 1986).

SUMMARY OF THE ARGUMENT

The district court properly entered summary judgment in Appellees' favor, because the record evidence before the district court conclusively demonstrates that TOSKI did not offer any evidence to show that he exhausted the administrative remedies pertaining to his RLA-based claims. The record further establishes that the "three torts" which TOSKI claims the district court should have spared from the entry of summary judgment in Appellees' favor were not even included in his Complaint and were not at issue in the case below. Moreover, the uncontroverted record is replete with evidence demonstrating numerous other factual and legal insufficiencies in TOSKI's claims, upon which this Court may affirm the district court's entry of summary judgment in Appellees' favor.

In addition, the district court did not abuse its discretion in denying TOSKI leave to amend his Complaint, because TOSKI's intended amendment was untimely and would have severely prejudiced Appellees' ability to properly defend this action and prepare for trial. Moreover, the district court did not abuse its discretion in denying TOSKI's Motion to "Formally Adopt" Fed.R.Civ.P. 30(b)(2) (1993), because that Rule does not afford the relief TOSKI requested. Finally, but no less significantly, TOSKI did not preserve any discovery issues for review on appeal because he did not file an appropriate and timely motion with the district court on those issues.

ARGUMENT AND CITATIONS OF AUTHORITIES

I. The district court properly entered summary judgment in Appellees' favor, because there is no genuine issue as to any material fact that TOSKI failed to exhaust the administrative remedies available to him.

It is settled law that a party seeking relief under the RLA for claims involving the interpretation and application of a collective bargaining agreement must exhaust the grievance and arbitration procedures established by that agreement before filing suit.[19] See, e.g., Andrews v. Louisville & Nashville Ry. Co., 406 U.S. 320, 324-325 (1972); Le Boutillier v. Airline Pilots Ass'n Int'l, 778 F.2d 883 (D.C. Cir. 1985) (affirming the dismissal of a pilot's wrongful discharge action, based on his failure to "invoke the contractual procedure for contesting his discharge," notwithstanding conclusory allegations in plaintiff's complaint that resort to those procedures would have been futile). See also Riddle v.

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[19] This case clearly involves "a minor dispute" within the meaning of the RLA since there is no effort made to bring about a change in the collective bargaining agreement or to create a new agreement. Airline Pilots Ass'n Int'l v. Texas Int'l Airlines, Inc., 567 F. Supp. 66, 70 (S.D. Tex. 1983) (quoting Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711, 752-753 (1945)).

Transworld Airlines, Inc., 512 F. Supp. 75 (W.D. Mo. 1991)(wherein the court dismissed an employee's suit against his employer for wrongful termination, based on the employees's admitted failure to exhaust available administrative remedies); Stevens v. Braniff Airways, Inc., 490 F. Supp. 231 (D. Minn. 1980); City of Miami v. Fraternal Order of Police Lodge No. 20, 378 So. 2d 20 (Fla. 3d DCA), cert. denied, 388 So. 2d 1113 (Fla. 1980). Moreover, it is equally well-established that the failure to do so mandates dismissal of the action for lack of subject matter jurisdiction. Riddle, 512 F. Supp. at 80.

It is undisputed that the CBA between EAL and the IAMAW, which was in effect at the time EAL terminated TOSKI, included a grievance procedure for the resolution of the employment related issues which form the basis for TOSKI's Complaint. See Articles 17 through 19 of the CBA, Vol. 1, Docs. 1 and 7, Exhibit B. It also is undisputed that TOSKI was intimately familiar with and routinely availed himself of that procedure in challenging the disciplinary actions of his supervisors. See TOSKI Deposition, Vol. 4, Doc. 97, Exhibit A, pp. 172-173, 383. Significantly, however, the uncontroverted record conclusively demonstrates that, although he completed the paperwork necessary to initiate the grievance process with respect to his claim for wrongful discharge, **TOSKI made a conscious decision not to pursue or, alternatively, to delay the pursuit of that claim before the SBA for strategic reasons**. See Id. at pp. 510-511, 515.[20] As a

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[20] TOSKI's categorical denial that he abandoned his termination grievance for strategic reasons is contrary to TOSKI's own deposition testimony, quoted as follows:

result, the SBA never considered, let alone issued a ruling on TOSKI's grievance. Id. at 515. TOSKI's failure to exhaust his administrative remedies divested the district court of jurisdiction to consider his RLA-based claims for relief and entitles Appellees to the entry of a summary final judgment in their favor with the respect to those claims.[21]

TOSKI attempts to avoid the bar resulting from his failure to exhaust administrative remedies by arguing that

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> Q: So you made a strategy decision to have the System Board of Adjustment consider you[r] grievances on the individual letters before they considered your grievance [relating to termination], correct?
>
> A: Exactly.

Vol. 6, Doc. 174, p. 5, n. 5 (quoting TOSKI Deposition, Vol. 4, Doc. 97, Exhibit A at pp. 510-511, 515).

[21] Indeed, TOSKI is collaterally estopped from relitigating the issue of whether he is entitled to pursue his RLA-based claims without first exhausting his administrative remedies by Judge Atkins' August 19, 1987 Order of Dismissal, in Case No. 87-1422-Civ-Atkins. See Vol. 4, Doc. 97, Exhibit G (wherein Judge Atkins held that the Court lacked jurisdiction to consider TOSKI's claims, because he had not exhausted his administrative remedies). See also Blonder-Tongue Lab. Inc.v. University of Ill. Found., 402 U.S. 313 (1971); Hann v. Curson, 462 F. Supp. 854, 864 (M.D. Fla. 1978).

the SBA was not available to hear grievances after EAL's bankruptcy. However, TOSKI has not proffered any evidence, nor has he even attempted to explain why he did not or could not exhaust his administrative remedies in the **two (2) years and four (4) months** that elapsed between the time he initially filed his grievance (November 12, 1986) and the date on which EAL declared bankruptcy (March 9, 1989).[22] Indeed, TOSKI's own testimony belies his contention that EAL's bankruptcy rendered the grievance procedures a "dead end,"[23] in that he admitted that nothing prevented him from pursuing the termination grievance with the arbitration appeal simultaneously. See TOSKI Deposition, Vol. 4, Doc. 97, Exhibit A, p. 510-511, 515. Furthermore, TOSKI's claims of futility in following the grievance procedures provided by the CBA are insufficient, as a matter of law, to avoid this jurisdictional rule. Le Boutillier, 778 F.2d 883, 885.

Citing Walker v. Southern Ry. Co., 385 U.S. 196 (1966), TOSKI also asserts that he was not required to exhaust his administrative remedies, ostensibly because he had "accepted his discharge as final." However, TOSKI's

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[22] See August 24, 1993 "Order and Notice to Parties," Vol. 4, Doc. 110 (wherein the district court reminded TOSKI that he was required, in order to oppose Appellees' Motion for Summary Judgment, to file a memorandum of law, "necessary sworn affidavits and other material" and a concise statement of material facts in opposition to the motion).

[23] TOSKI's Brief, p. 13.

own pleadings belie this factually unsupported assertion. In fact, in his Complaint, TOSKI affirmatively alleges that he was only willing to accept his discharge as final **effective March 4, 1989** (i.e., the approximate date on which TOSKI would have lost his job as a result of the union strike), **nearly three (3) years after EAL terminated his employment**. See TOSKI's Complaint, Vol. 1, Doc. 1,; Vol. 1 (1st Supp.), Doc. 189, p. 19 at Paragraph Nos. 101-102. In fact, TOSKI alleges that Appellees are liable for his back wages and benefits from the date of his termination (i.e., November 7, 1986) until the date of the strike (i.e., March 4, 1989). Id. Thus, it is disingenuous, at best, for TOSKI to claim that he accepted his discharge as final.[24]

Moreover, Judges Atkins, Davis and Turnoff, each of whom reviewed the circumstances surrounding EAL's discharge of TOSKI in a light most favorable to TOSKI, have repeatedly rejected TOSKI's contention, which is not supported by any record evidence, and held that TOSKI's admitted failure to exhaust his administrative remedies precludes his claims for relief in federal court, as a matter of law. See, e.g., Vol. 4, Doc. 97, Exhibit G; Vol. 6, Doc.

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[24] TOSKI's reliance on Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988), as support for the contention that he is not required to exhaust his administrative remedies is similarly misplaced, since it is apparent that the plaintiff in that case pursued and ultimately exhausted her grievance remedies under the applicable collective bargaining agreement. Thus, the Lingle Court was not required to address the exhaustion issue.

174, p. 6, n. 6; Vol. 6, Doc. 182. See also Union P. R. Co. v. Sheehan, 439 U.S. 89 (1978)(adjustment board has primary and exclusive jurisdiction over minor disputes). Accordingly, the district court correctly determined that TOSKI's undisputed failure to proceed with the grievance he filed at his termination bars TOSKI's RLA-based claims and properly entered summary final judgment in Appellees' favor.[25]

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[25] In TOSKI's objections to Magistrate Judge Turnoff's Report and Recommendation, TOSKI, for the first time, asserted, without a shred of supporting evidence, that "[t]he Plaintiff does not agree--for several litigable issues--that the Plaintiff was subject to the collective bargaining agreement in effect between the Union and EAL." Vol. 6, Doc. 175, p. 4. See also TOSKI's Brief, p. 12. TOSKI's position is untenable, because TOSKI also maintains, **in the same paragraph**, that he "invoked--properly and in a timely manner--the contractual mechanism for dispute resolution provided in the [CBA]." Id. Moreover, TOSKI has wholly failed to satisfy his burden of designating facts in the record that show a genuine issue of fact that he was not subject to the CBA and, therefore, he has not properly preserved this argument for appellate review. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Likewise, TOSKI did not raise in his Response to Appellees' Motion for Summary Judgment and, therefore, has waived his unsupported argument that the CBA ceased to exist as of December 31, 1987 and was, after that date, "subject to change."

II. This Court should affirm the district court's entry of summary judgment in Appellees' favor on TOSKI's state law claims, because: (1) TOSKI has not challenged the district court's ruling that those claims are preempted by the RLA; and (2) the three torts that TOSKI claims are not preempted are not at issue in this case.

In recommending that the district court enter summary final judgment in favor of Appellees, Magistrate Judge Turnoff found, and Judge Davis agreed, that the RLA preempted TOSKI's remaining state law claims. See Report and Recommendation, Vol. 6, Doc. 174, pp. 7-10; Order Adopting Magistrate's Report and Recommendation, Vol. 6, Doc. 179. TOSKI did not dispute before the district court and now does not challenge the district court's conclusion that the RLA preempts the state law tort claims in his Complaint. See TOSKI's Response to Appellees' Motion for Summary Final Judgment, Vol. 5, Doc. 162, pp. 3-4; TOSKI's Brief, p. 17.

Instead, TOSKI argues on appeal, for the first time, that Appellees allegedly committed three torts after he filed his Complaint which purportedly occurred "separately from [TOSKI's] employment at EAL" and, therefore, are not preempted. See TOSKI's Brief, pp. 5, 6 and 17 (wherein TOSKI alleges that: (1) Appellee WILLIAMS confiscated TOSKI's airport pass, preventing

TOSKI from performing his duties as Shop Steward;[26] (2) Appellees' counsel "persuaded one of their court reporters to produce an affidavit which contained absolutely false accusations and slanderous statements, conjured up purely to make [TOSKI] appear offensive in the eyes of the court;" and (3) EAL gave TOSKI's original personnel file to Appellees' counsel).

Significantly, however, TOSKI is foreclosed from arguing on appeal that the "three (3+) torts" are not preempted by the RLA, because: (1) those claims are not included in TOSKI's Complaint; and (2) TOSKI did not assert, let alone proffer any record evidence to support this argument before the district court, despite the district court's admonition to TOSKI to do so.[27] See Infant Formula Antitrust Litigation, MDL 878 v. Abbott Laboratories, Inc., 72 F.3d 842, n. 1 (11th Cir. 1995)(appellants were foreclosed from raising issue on appeal that they did not raise before the district court); F.D.I.C. v. Verex Assur., Inc., 3 F.3d 391, 395 (11th Cir. 1993)(wherein the court declined to consider an argument raised for the first time on appeal, noting that "no substantial interest of justice is at stake, as these interests are `generally equated with the vindication of fundamental

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[26] TOSKI's claim that, after his termination, Appellees refused to allow TOSKI access to the union members TOSKI represented was incorporated in Count IV, which TOSKI pled as a violation of the RLA. See TOSKI's Complaint, Vol. 1, Doc. 1; Vol. 1 (1st Supp.), Doc. 189. Id. at Paragraph No. 110.

[27] See Vol. 4, Doc. 110.

constitutional rights'")(quoting In re Daikin Miami Overseas, Inc., 868 F.2d 1201, 1207 (11th Cir. 1989)). See also TOSKI's Response to Appellees' Motion for Summary Judgment, Vol. 5, Doc. 162, p. 4 (wherein TOSKI claimed that the "doctrine of preemption does not apply [to his tort claims] because [TOSKI] has exhausted his administrative remedies and has pleaded all claims in a timely manner"); TOSKI's Objections to Report and Recommendation, Vol. 6, Doc. 175 (wherein TOSKI does not refer to the issue of preemption relating to his state law claims). Accordingly, this Court should affirm the district court's entry of summary final judgment in Appellees' favor on TOSKI's state law claims.

III. There are numerous and substantial other grounds upon which this Court properly could affirm the district court's entry of a summary final judgment in Appellees' favor, all of which were asserted in Appellees' Motion for Summary Final Judgment.

It is settled law that an appellate court may affirm the district court's decision on any ground raised below. See Novak, 986 F.2d at 470; Bonani Ship Supply, Inc., at 1561. Although the district court found it unnecessary to address each of the separate arguments that Appellees asserted in support of their Motion for Summary Final Judgment, these arguments also conclusively demonstrate that each of the claims in TOSKI's Complaint are legally and factually deficient as a matter of law and provide an independent basis upon which to affirm the district court's

entry of Summary Final Judgment in Appellees' favor.

A. The applicable six month statute of limitations bars TOSKI's claim for relief under the RLA.

The RLA does not specify the time within which an injured party must file claims under Section 152 of the Act. However, federal courts, relying on the reasoning of the U.S. Supreme Court in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), repeatedly have borrowed and applied the six (6) month limitations period found in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1984), to a variety of such claims. See, e.g., Robinson v. Pan Am. World Airways, 777 F.2d 84 (2d Cir. 1985); Brock v. Republic Airlines, Inc., 776 F.2d 523 (5th Cir. 1985). See also Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co., 768 F.2d 914 (7th Cir. 1985) (Section 10(b)'s six (6) month limitations period governs action for breach of a collective bargaining agreement and an alleged violation of section 2, First of the RLA). Atkins v. Zantop Int'l Airlines, 18 Av. Cas. (CCH), ¶ 18,290 (E.D. Mich. 1984) (wherein the Court applied Section 10(b)'s six (6) month limitations period in dismissing a wrongful discharge claim under section 2, Third and Fourth of the RLA).

In Count IV of his Complaint, TOSKI alleges that Appellees violated 45 U.S.C. § 152 (First, Second and Third) (1948) by purportedly: (1) failing to "make and maintain" the CBA; (2) failing to settle disputes in an expeditious manner; (3) refusing to allow TOSKI access

to shop employees after his termination; and (4) attempting to coerce and influence shop mechanics prior to his election as shop steward. See TOSKI's Complaint, Vol. 1, Doc.1; Vol. 1 (1st Supp.), Doc. 189, pp. 21 and 22. However, a review of the undisputed record before the district court establishes, as a matter of law, that each of the Appellees' alleged acts and/or omissions occurred, if at all, well beyond six (6) months prior to the filing of his Complaint on **October 23, 1990**, and, therefore, are time-barred.

It is undisputed, for example, that TOSKI was elected Shop Steward on **October 16, 1986**. See TOSKI Deposition, Vol. 4, Doc. 97, Exhibit A, p. 181. Thus, by definition, Appellee McDONNELL's alleged attempt to influence the vote in that election must have occurred, if at all, before that date or more than **four (4) years** prior to the filing of TOSKI's Complaint. Similarly, TOSKI alleges and has admitted that he last sought and was refused access to the EAL facility in July of 1987. Id. at pp. 528 and 529. Accordingly, to the extent that Appellees' refusal to afford him access to the property was actionable under the RLA, which Appellees deny, that claim must have accrued, if at all, on or before that date or more than **three (3) years** prior to the filing of TOSKI's Complaint.

The same is true with respect to TOSKI's remaining claims (i.e., that Appellees allegedly failed to settle disputes in an expeditious manner and/or failed to "make and maintain" the CBA), since those alleged failures must have occurred, if at all, sometime prior to EAL's decision to terminate TOSKI's employment on **November 7, 1986** - slightly less than **four (4) years** prior to the filing of

TOSKI's Complaint. In sum, none of the alleged acts or omissions of the Appellees occurred, if at all, within six (6) months of the filing of TOSKI's Complaint. Accordingly, TOSKI's claims under the RLA are time-barred, as a matter of law, and Appellees are entitled to summary judgment on these claims.[28]

B. Appellees also are entitled to summary judgment on TOSKI's claim for negligent retention, because EAL and not Appellees HENRY or WILLIAMS was McDONNELL's "employer" under Florida law.

In order to prevail on a claim for negligent retention in Florida, a plaintiff must plead and prove that, during the course of his employment, an **employer** failed to investigate, discharge or reassign an employee, when the employer knew or should have known of a problem that rendered the employee unfit to perform his job. See, e.g., Garcia v. Duffy, 492 So. 2d 435, 438-39 (Fla. 2d DCA 1986). Thus, Florida courts uniformly require plaintiffs who seek relief on a theory of negligent retention to name

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[28] Appellees also are entitled to summary judgment on TOSKI's claims under Section 152 (Second and Third) because he has not alleged and did he proffer any evidence to the district court, that Appellees are "carriers" within the meaning of the Act. See 45 U.S.C. §151 (First). See also 45 U.S.C. §181 (1926).

the employer of the allegedly culpable employee as a defendant in the action. See, e.g., Byrd v. Richardson-Greenshield Securities, Inc., 552 So. 2d 1099 (Fla. 1989). See also Bennett v. Godfather's Pizza, Inc., 570 So. 2d 1351 (Fla. 3d DCA 1990).

In Count II of his Complaint, TOSKI alleges that Appellees HENRY and WILLIAMS negligently retained Appellee McDONNELL. See TOSKI's Complaint, Vol. 1, Doc. 1; Vol. 1 (1st Supp.), Doc. 189, pp. 17-18. However, the record before the district court was completely devoid of any evidence, which, if believed, would establish that HENRY or WILLIAMS was Appellee McDONNELL's "employer," as required by Florida law. For example, there is no evidence that Appellee HENRY hired Appellee McDONNELL or that he had the authority to reassign or fire him. In fact, if TOSKI is to be believed, Appellee HENRY was nothing more than "a bottom of the totem pole [shop] foreman," who had at least two layers of management supervision above him at virtually all times material to the Complaint. See TOSKI Deposition, Vol. 4, Doc. 97, Exhibit A, pp. 55 and 56.

The record is similarly devoid of any evidence that Appellee WILLIAMS was Appellee McDONNELL's "employer" for any purpose. In fact, the undisputed record before the district court establishes that Appellee WILLIAMS did not have any involvement in the alleged acts or omissions upon which TOSKI's Complaint is predicated until November 3, 1986 (i.e., four days prior to TOSKI's termination), when he assumed the position of Manager in the GSE Shop. Id. at p. 482. More importantly, there was no evidence before the district court to suggest that, during that four day period, Appellee WILLIAMS acquired knowledge which would have

warranted Appellee McDONNELL's dismissal or that he had the unilateral authority to effectuate such a dismissal. Indeed, there was no evidence before the district court that Appellee WILLIAMS even had the authority to terminate TOSKI, a line mechanic, without the approval of senior EAL management personnel. Id. at p. 505.

Simply stated, there was no evidence before the district court that anyone other than EAL was Appellee McDONNELL's "employer" for purposes of assessing TOSKI's alleged entitlement to damages for negligent retention. Accordingly, TOSKI's failure to name EAL as a party defendant defeats the claim for negligent retention in Count II of his Complaint as a matter of law.

C. Appellees are entitled to summary judgment on Count III of TOSKI's Complaint, because Appellee WILLIAMS is not an "employer" within the meaning of § 440.02, Fla. Stat. (1989) and, therefore, he cannot be held liable for wrongful discharge, under § 440.205, Fla. Stat. (1987), as a matter of law.

In Count III of his Complaint, TOSKI seeks to recover damages against Appellee WILLIAMS on a theory of wrongful discharge. See TOSKI's Complaint, Vol. 1, Doc. 1; Vol. 1 (1st Supp.), Doc. 189, p. 19. Specifically, TOSKI alleges that Appellee WILLIAMS violated § 440.205, Fla. Stat. (1987) of Florida Worker's

Compensation Law, which provides, in pertinent part, that:

> no **employer** shall discharge, threaten to discharge, intimidate or coerce any employee by reason of such employee's **valid claim for compensation** or **attempt to claim compensation** under the Workers' Compensation Law.

Id. (emphasis added). See also TOSKI's Complaint, Vol. 1, Doc.1; Vol. 1 (1st Supp.), Doc. 189, p. 19 at Paragraph No. 101. However, a review of the applicable statute and the undisputed record before the district court conclusively demonstrates that TOSKI cannot prevail on a wrongful discharge claim under Section 440.205, as a matter of law.

The legal and factual deficiencies in TOSKI's wrongful discharge claim are twofold. First, TOSKI did not proffer any evidence to the district court that Appellee WILLIAMS was an "employer," within the meaning of § 440.02(13), Fla. Stat. (1987), which defines "employer" for purposes of the Act as:

> the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person.

Id. Indeed, the undisputed record evidence before the district court affirmatively demonstrates that **EAL** and not Appellee WILLIAMS was TOSKI's "employer" for

purposes of the Act. There is no dispute, for example, that EAL hired TOSKI or that it directed his transfers from one position in the company to another. See TOSKI Deposition, Vol. 4, Doc. 97, Exhibit A, p. 42. In addition, there is no question that EAL was the issuer of TOSKI's paychecks. Id. at p. 497. More importantly, despite his obvious reluctance to do so, TOSKI ultimately conceded that it was "**EAL** with [Appellee WILLIAMS] as a duly authorized agent, [that] terminated [his] employment on November 7, 1986." Id. at p. 500 (emphasis added).

In contrast, Appellee WILLIAMS bears none of the indicia traditionally associated with an employer. In fact, Appellee **WILLIAMS was not even working at the Miami facility when EAL hired TOSKI**. Id. at p. 104. Moreover, TOSKI has admitted that he did not have any dealings with Appellee WILLIAMS before **November 3, 1986** (i.e., four days prior to TOSKI's termination), when Appellee WILLIAMS assumed the position of Manager in the GSE Shop. Id. at p. 482. More importantly, there is no evidence that Appellee WILLIAMS had the authority to terminate TOSKI without the approval of senior EAL management personnel. Id. at p. 505.

Additionally, TOSKI did not proffer any evidence to the district court that he had a "**valid claim** for compensation" or ever "**attempt[ed] to claim compensation** under the Worker's Compensation Act," as required by the plain language of the statute. Section 440.205, Fla. Stat. (1987)(emphasis added). Instead, the undisputed record before the district court conclusively

demonstrates that the **sole reason** TOSKI even reported the purported injury to EAL's First Aid Department on November 6, 1986 was to document an alleged incident that had occurred between himself and Appellee McDONNELL. See TOSKI Deposition, Vol. 4, Doc. 97, Exhibit A, p. 451. In the absence of such proof, Section 440.205 is, by its own terms, inapplicable. Accordingly, Appellee WILLIAMS is entitled to summary judgment on Count III of TOSKI's Complaint.[29]

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[29] Appellee WILLIAMS also is entitled to summary judgment on the claim for attorneys' fees in Count III, since the basis for TOSKI's wrongful discharge action is §440.205, Fla. Stat. (1987) **and not** the General Labor Relations Act, §448.01, et seq., Fla. Stat. (1984). See, e.g., Munsey v. General Tel. Co., 538 So. 2d 1328 (Fla. 2d DCA 1989) (where an employee's claim for damages arises under a statute other than Florida's General Labor Relations Act, the employee is not entitled to avail himself of Section 448.08 as a means of recovering the attorneys' fees incurred in prosecuting the action).

D. Appellees are entitled to summary judgment on Count V of TOSKI's Complaint, because Florida does not recognize an implied covenant of good faith and fair dealing in a claim involving wrongful discharge.

Florida courts steadfastly have refused to recognize a cause of action for breach of an alleged "duty of good faith and fair dealing" where the basis of the plaintiff's claim is wrongful discharge. See, e.g., Kelly v. Gill, 544 So. 2d 1162 (Fla. 5th DCA 1989). See also Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. 2d DCA 1983). In Kelly, for example, the plaintiff brought a wrongful discharge action against his former employer. The employer, in turn, successfully moved for summary judgment on the wrongful termination claim. However, the trial court granted summary judgment in favor of the former employee on his claim for injunctive relief. Both parties appealed.

The appellate court affirmed the trial court's judgment against the former employee, but reversed the judgment insofar as it awarded the employee injunctive relief. In reaching its decision, the Court relied on the well-established premise that, in the absence of a specific statute granting a property interest, a contract of employment which is indefinite as to the term of

employment is terminable at the will of either party. Smith v. Piezo Technology & Professional Adm'rs, 427 So. 2d 182 (Fla. 1983); Gibbs v. H.J. Heinz Co., 536 So. 2d 370 (Fla. 5th DCA 1988); McConnell v. Eastern Airlines, Inc., 499 So. 2d 68 (Fla. 3d DCA 1986).

In Count V of his Complaint, TOSKI attempts to allege a cause of action for breach of a "covenant of good faith and fair dealing." See TOSKI's Complaint, Vol. 1, Doc. 1; Vol. 1 (1st Supp.), Doc. 189, p. 23. However, there was no evidence in the record before the district court to support the proposition that TOSKI had a contract with EAL which was **definite** as to the term of employment. On the contrary, the record before the district court establishes that EAL had the absolute right to terminate TOSKI for cause. See Vol. 1, Docs. 1 and 7, Exhibit B at Article 18. Moreover, TOSKI did not allege the existence of or direct Appellees or the district court to any statute, which created a property interest in his employment with EAL. Thus, there was no proof before the district court, which, if believed, would allow TOSKI to maintain an action for breach of an "implied covenant of good faith and fair dealing" against Appellees. Accordingly, Appellees are entitled to summary judgment in their favor on Count V of TOSKI's Complaint, as a matter of law.[30]

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[30] Appellees also are entitled to summary judgment on TOSKI's claim for breach of an "implied covenant of good faith and fair dealing," because: (1) such a covenant does

E. Appellees are entitled to summary judgment on Count VI of TOSKI's Complaint, because they are not parties to the CBA, which forms the basis for TOSKI's breach of contract claim.

Although Florida appellate courts have not specifically addressed the issue, courts in other jurisdictions have consistently held that a plaintiff may not hold a defendant accountable for the breach of a contract unless he pleads and proves that the defendant was a party to the agreement. See, e.g., Implement Serv., Inc. v. Tecumseh Products, Co., 726 F. Supp. 1171, 1182 (S.D. Ind. 1989) (summary judgment proper where it is apparent from the face of the complaint that the defendant was not a party to the distributorship agreement); Mellencamp v. Riva Music Ltd., 698 F. Supp. 1154 (S.D.N.Y. 1988) (dismissing a songwriter's breach of contract claims against two recording companies, who were not parties to the disputed publishing agreements, notwithstanding the

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not exist, as a matter of law, between TOSKI and his co-employees, see, e.g., Smith 427 So. 2d at 184; see also McConnell, 499 So. 2d at 69; and (2) the undisputed record establishes that **EAL and not Appellees** was TOSKI's employer at all times material to this action. See Section C, supra.

fact that they "assisted" the other defendants in the "administration" of those agreements). See also Kinion v. Design Systems, Inc., 641 P.2d 472 (Mont. 1981).

In Count VI of his Complaint, TOSKI attempts to state a cause of action for breach of contract against Appellees. See TOSKI's Complaint, Vol. 1, Doc. 1; Vol. 1 (1st Supp.), Doc. 189, pp. 24-25. However, a review of the allegations in Count VI, as well as the plain language of the CBA that forms the basis for TOSKI's claims, conclusively demonstrates that Appellees are not parties to that Agreement. See Id. at pp. 2 and 24 at Paragraph Nos. 8 and 116, respectively. Instead, it is apparent that the parties to that Agreement are EAL and the IAMAW, neither of whom is a defendant in this action. Id. Accordingly, TOSKI's claim for breach of contract is fatally deficient and, therefore, Appellees are entitled to summary judgment on Count VI of the Complaint, as a matter of law.[31]

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[31] It is axiomatic that, under Florida law, a party may not recover punitive damages for breach of contract, irrespective of the motive of the defendant, unless he pleads and proves that the breach was attended by a "separate and independent tort" which is, in itself, sufficient to support such an award. See, e.g., Lewis v. Guthartz, 428 So. 2d 222 (Fla. 1982). See also Rolls v. Bliss & Nyitray, Inc., 408 So. 2d 229 (Fla. 3d DCA 1981). Since TOSKI has not alleged, nor did he proffer evidence to the district court that, in conjunction with the alleged breach, Appellees committed a separate and independent

F. Appellees HENRY and McDONNELL are entitled to summary judgment on TOSKI's claim that they wrongfully destroyed evidence, because TOSKI has not established any of the elements necessary to maintain such an action under Florida law.

Florida courts recognize "negligent destruction of evidence" as an independent cause of action. See, e.g., Continental Ins. Co. v. Herman, 576 So. 2d 313 (Fla. 3d DCA 1991). See also Miller v. Allstate Ins. Co., 573 So. 2d 24 (Fla. 3d DCA 1990). However, these courts have made it clear that a plaintiff may not maintain such an action unless he alleges and proves each of the following elements:

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tort which would warrant the imposition of such damages, he is not entitled to recover punitive damages in Count VI and Appellees are entitled to summary judgment in their favor as to that claim. See Section G, infra.

> (1) [the] existence of a potential **civil action**; (2) a **legal or contractual duty** to preserve evidence which is relevant to the **potential civil action**; (3) [the] destruction of that evidence; (4) **significant impairment** in the ability to prove the **lawsuit**; (5) a causal relationship between the evidence destruction and the inability to prove **the lawsuit**; [and] (6) damages.

Continental Ins. Co., 576 So. 2d at 315 (emphasis added) (wherein the court held that a plaintiff, who already had recovered substantial damages for injuries she sustained in an automobile accident, notwithstanding the partial disassembly and ultimate destruction of the subject vehicle, did not have a cause of action for destruction of evidence, because "she suffered no significant impairment in [her] ability to prove the underlying lawsuit").

In Count VII of his Complaint, TOSKI alleges that Appellees McDONNELL and HENRY failed to protect a G.E.A.R.S. (i.e., work order) relating to work that was the subject of a grievance he filed with the SBA. See TOSKI's Complaint, Vol. 1, Doc.1; Vol. 1 (1st Supp.), Doc. 189, p. 26 at Paragraph No. 127. Significantly, however, the record before the district court was completely devoid of evidence which, if believed, would establish any of the elements necessary to make that alleged "failure to protect" actionable. For example, TOSKI did not allege, let alone proffer evidence to the district court sufficient to

establish the existence of or the potential for a "civil action" or "lawsuit" relating to the subject evidence. Instead, TOSKI merely alleged that the purported evidence would have benefited him in various grievance proceedings and/or enhanced his "prospective bargaining advantage." See Id. at Paragraph Nos. 127 and 128. More importantly, TOSKI did not allege or proffer evidence to the district court that Appellees had a statutory and/or contractual "duty to retain and protect" the subject evidence. TOSKI also did not proffer any evidence to the district court that Appellees HENRY or McDONNELL destroyed the subject work order.[32] Finally, TOSKI did not allege, nor did he proffer evidence to the district court that Appellees' purported failure to discharge that duty resulted in any damages. In sum, there was no evidence in the record before the district court, which, if believed, would establish any of the elements necessary to maintain an independent action for "negligent destruction of evidence." Accordingly, Appellees HENRY and McDONNELL are entitled to summary judgment in their favor on Count VII of the Complaint.

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[32] In fact, TOSKI affirmatively acknowledged he has no recollection of the records retention policy at EAL with respect to such work orders and, therefore, has no basis for disputing EAL's position that the subject work order was discarded after six (6) months as part of EAL's routine business practices. See TOSKI Deposition, Vol. 4, Doc. 97, Exhibit A, p. 152.

G. There is no evidence that Appellees acted with the degree of culpability which is required to support a conviction for manslaughter and, therefore, TOSKI's claims for punitive damages are insufficient as a matter of law.

It is settled law in Florida that mere allegations of simple negligence, without evidentiary support, will not support an award of punitive damages. See Winn & Lovett Grocery Co. v. Archer, 171 So. 214 (Fla. 1936). In fact, even allegations amounting to gross negligence, without more, do not justify the imposition of punitive damages. See White Constr. Co. v. DuPont, 455 So. 2d 1026 (Fla. 1984). Instead, the Florida Supreme Court has made it clear that the degree of negligence necessary to support an award of punitive damages is the same as that which is required to support a conviction of manslaughter under the "culpable negligence" standard. Id. at 1028. See also Como Oil Co. v. O'Laughlin, 466 So. 2d 1061, 1062 (Fla. 1985); Ten Assocs. v. Brunson, 492 So. 2d 1149 (Fla. 3d DCA 1986). It is equally well-settled that where the allegations of the complaint, even if taken as true, would not satisfy this stringent standard, the appropriate remedy is a motion to strike the claim. See, e.g., Bradenton Mall Assocs. v. Hill,

508 So. 2d 538 (Fla. 2d DCA 1987).

TOSKI includes claims for punitive damages in Counts I, II, IV, V and VI of his Complaint. See TOSKI's Complaint, Vol. 1, Doc. 1; Vol. 1 (1st Supp.), Doc. 189, pp. 16, 18, 22, 23 and 25. However, TOSKI did not proffer any evidence to the district court that Appellees engaged in the type of conduct that Florida courts require to substantiate such a claim. In fact, there was no evidence in the record before the district court which even remotely establishes the degree of culpability on the part of the Appellees necessary to maintain a claim for punitive damages under the White standard. Accordingly, TOSKI has not stated a claim for punitive damages and, therefore, Appellees are entitled to summary judgment on any and all such claims in the Complaint.

H. There is no evidence in the record that Appellees were engaged in a conspiracy and, therefore, Appellees are entitled to judgment, as a matter of law, on Count IX of TOSKI's Complaint.

Florida courts consistently have held that a party cannot prevail on a claim for civil conspiracy unless he pleads and proves: (1) an agreement between two or more persons to achieve an unlawful objective; (2) one or more overt acts pursuant to the agreement; and (3) resulting

injury to the plaintiff. See Stringfellow v. Breidegam, 138 So. 2d 75, 76 (Fla. 3d DCA 1962). Moreover, it is equally well-established that members of a single economic unit, such as officers and/or personnel associated with any one corporation, do not constitute the required combination of separate economic groups or forces to support a cause of action for the independent tort of conspiracy. See Bryant Heating & A.C. v. Carrier Corp., 597 F. Supp. 1045 (S.D. Fla. 1984). See also American Credit Card Tel. v. New York Pay Tel., 504 So. 2d 486 (Fla. 1st DCA 1987) (affirming the trial court's dismissal of plaintiff's complaint with respect to civil conspiracy, where there were no allegations that corporate officers were acting under any independent motivation, as required to state a conspiracy claim against officers individually); Baker v. McDonald's Corp., 686 F. Supp. 1474 (S.D. Fla. 1987), aff'd, 865 F.2d 1272 (11th Cir. 1988), cert. denied, 493 U.S. 812 (1989).

In Count IX of his Complaint, TOSKI attempts, by way of conclusory allegations, to assert a claim for civil conspiracy. See TOSKI's Complaint, Vol. 1, Doc. 1; Vol. 1 (1st Supp.), Doc. 189, p. 28. Significantly, however, TOSKI did not allege, nor did he proffer any evidence to the district court that there was an agreement between or among Appellees for any purpose. TOSKI also did not proffer any evidence to the district court that Appellees performed an unlawful act or a lawful act by unlawful means in furtherance of that agreement. On the contrary, TOSKI candidly has admitted that he does not have any direct evidence that such a conspiracy existed by

and between the Appellees. See TOSKI Deposition, Vol. 4, Doc. 97, Exhibit A, pp. 570 through 572. In fact, aside from some unsupported speculation, TOSKI does not have any proof that Appellees HENRY or McDONNELL even participated in the decision to terminate his employment. Id. at 502 through 504. The complete absence of such proof is fatal to TOSKI's claim for civil conspiracy, as a matter of law. Accordingly, Appellees are entitled to summary judgment in their favor on Count IX of TOSKI's Complaint.[33]

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[33] Appellees also are entitled to summary judgment on the claim for "attorneys' fees" in Counts III, VIII and IX of TOSKI's Complaint, because: (1) TOSKI has not alleged that a contractual or statutory basis exists for such an award, as required by Florida law, see, e.g., Dorner v. Red Top Cab & Baggage Co., 37 So. 2d 160,161 (Fla. 1948), Caceres v. Physicians Protective Trust Fund, 489 So. 2d 869 (Fla. 3d DCA 1986); and (2) as a pro se litigant, TOSKI did not pay, nor has he incurred an obligation to pay, any "attorney's" fees in conjunction with the prosecution of this action, see Cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. 1981) (prevailing plaintiff, who appeared pro se in employment discrimination action, was not entitled to recover attorney's fees), see also Winicki v. Mallard, 441 So. 2d 693 (Fla. 1st DCA 1983) (holding that a pro se attorney in a civil rights action was not entitled to attorneys' fees under Florida law).

IV. Magistrate Judge Turnoff did not abuse his discretion in recommending that the district court deny TOSKI's August 23, 1993 Motion for Leave to Amend and Supplement [his] Complaint.[34]

Six (6) days after Appellees filed their Motion for Summary Judgment, three (3) years after filing his original Complaint, and one (1) month before the twice-previously extended discovery cut-off date, TOSKI sought leave to amend his Complaint based on purported "illicit dealings which [Appellees] were involved in while working in a supervisory capacity in the EAL ground equipment repair shop." See TOSKI's August 23, 1993 Motion for Leave to Amend and Supplement Complaint ("TOSKI's Motion to Amend"), Vol. 4, Doc. 104, pp. 2-3. In support of this allegation, TOSKI asserted that he was then aware of a "co-worker" of the Appellees, who purportedly had documents which "clearly demonstrate the illicit dealings." Id. Significantly, however, TOSKI never identified this supposed witness, nor did he identify the document, or, for that matter, the "illicit dealings" which the Appellees purportedly engaged in during their tenure at EAL. In addition, TOSKI made no reference as to how these supposed "illicit dealings" impacted him or this lawsuit.

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[34] Vol. 6, Doc. 68.

Appellees, in turn, opposed TOSKI's Motion, noting that the case was set for the November 1, 1993 trial calendar, after being re-set twice, and that the case involved TOSKI's termination from EAL, which occurred **seven (7) years before**. See Appellees' Memorandum of Law in Opposition to TOSKI's Motion to Amend, Vol. 5, Doc. 131, p. 2. On October 27, 1994, Magistrate Judge Turnoff issued an Order and Recommendation in which he recommended that the district court deny TOSKI's Motion, based on his finding that "[TOSKI]'s Motion did not set out sufficient facts to justify amending his Complaint at this late juncture" and because TOSKI failed to comply with S.D. Fla. L.R. 15.1. See Vol. 6, Doc. 168. Significantly, TOSKI did not file timely objections to Magistrate Judge Turnoff's Report and Recommendation.[35] See Fed. R. Civ. P. 72. Nonetheless, TOSKI now contends that Fed. R. Civ. P. 15(b) obligated the district court to afford TOSKI leave to amend his Complaint to include three torts Appellees allegedly committed

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[35] The docket entry for the Report and Recommendation (Vol. 6, Doc. 168) in the Certificate of Readiness and Transmittal of Record on Appeal at p. 17 indicates that TOSKI's Motion was "no longer referred," presumably to the district court. In any event, in the district court's Final Order dated February 1, 1993, Judge Davis denied as "moot" all pending motions. See Vol. 6, Doc. 179.

subsequent to the filing of his Complaint.[36] TOSKI's Brief, p. 17. TOSKI also contends, in a conclusory fashion, that the district court erred in refusing TOSKI leave to amend his Complaint to include a fourth tort, based on Appellees' alleged "illicit transactions which interfered with [TOSKI]'s contractual relations with EAL." Id.

It was well within Magistrate Judge Turnoff's discretion to deny TOSKI's untimely Motion to Amend his Complaint for several reasons. First, Appellees would have been severely prejudiced if the Court had granted TOSKI's Motion, given that it was filed three (3) years after the original Complaint, one (1) month before the twice previously-extended discovery cut-off date and only two (2) months prior to the scheduled trial date.[37] See,

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[36] In contrast, in TOSKI's Motion to Amend, TOSKI only requested leave to amend his Complaint to "illustrate and provide a foundation for [documents regarding Appellees' illicit transactions]" and to "supplement his Complaint" with a claim that Appellees' counsel and EAL violated his "privacy rights" by allegedly exchanging documents. See TOSKI's Motion to Amend, Vol. 4, Doc. 104, pp. 2-3.

[37] Judge Davis, in an August 20, 1993 Order, advised the parties that "the Court will provide only a limited extension of time to bring the case to trial" and extended the discovery cut-off until September 24, 1993. Vol. 4, Doc. 101, p. 3.

e.g., Foman v. Davis, 371 U.S. 178 (1962)(a district court properly exercises its substantial discretion in denying leave to amend on the grounds of "undue delay, bad faith or dilatory motive," or "undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc."); Datascope Corp. v. SMEC, Inc., 962 F.2d 1043 (Fed. Cir. 1992) (wherein the court held that "[a]t some time point, delay will become `undue' placing an unwarranted burden on the court, or will become `prejudicial,' placing an unfair burden on the opposing party") (quoting Adams v. Gould, Inc., 739 F.2d 858, 868 (3d Cir. 1984)).[38]

Courts also strongly disfavor the granting of leave to amend a complaint, where, as here, the plaintiff seeks leave to amend, for the first time, in response to a defendant's motion for summary judgment. See Executive Leasing Corp. v. Banco Popular de Puerto Rico, 48 F.3d 66, 71 (1st Cir. 1995)(no abuse to deny motion for leave to amend complaint when summary judgment motion was pending); C.L.-Alexanders Laing & Cruickshank v. Goldfeld, 739 F. Supp. 158 (S.D.N.Y. 1990) (holding that "when the motion [to amend] is made after discovery has

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[38] Carson v. Polley, 689 F.2d 562, 583-584 (5th Cir. 1982), cited in TOSKI's Brief, is distinguishable because the plaintiff in Carson, unlike TOSKI, sought leave to amend his Complaint to include a specific cause of action and the reviewing court found that granting leave to amend would not result in prejudice to the defendant.

been completed and a motion for summary judgment has been filed, leave to amend is particularly disfavored because of the resultant prejudice to defendant"). Thus, on that basis alone, Magistrate Turnoff properly exercised his discretion in denying TOSKI's Motion.

Finally, but no less significantly, the allegations in TOSKI's Motion were vague, ambiguous and unexpected after three (3) years of litigation and, on that basis, standing alone, the Motion properly was denied. See also Diduck v. Kaszycki & Sons Contractors, Inc., 737 F. Supp. 792, 806-807 (S.D.N.Y. 1990)(prejudice has been found when a proposed amendment contains an unexpected allegation or defense), modified on other grounds, 974 F.2d 290 (2d Cir. 1990); Harrison Beverage Co. v. Dribeck Importers, Inc., 133 F.R.D. 463 (D.N.J. 1990).

V. The district court did not refuse to rule on TOSKI's "Motion for Formal Adoption of F.R.C.P. 30(b)(2)," because TOSKI did not file it with the district court. Moreover, the district court did not refuse "to adopt" Fed. R. Civ. P. 30(b)(2)(1993), which does not afford the relief that TOSKI requested in his Motion.

In TOSKI's "Motion for Formal Adoption of F.R.C.P. 30(b)(2)," he sought to have the district court "formerly adopt" Fed. R. Civ. P. 30(b)(2) (1993) in a misguided attempt to: (1) secure representation; and (2) prevent Appellees from using his deposition, which was taken 2½ years after the commencement of this action, against him at trial. Vol. 1 (1st Supp.), Doc. 187. Significantly, however, a review of the applicable authorities conclusively demonstrates that Rule 30(b)(2) was not intended, nor has it been applied to afford a *pro se* plaintiff with the relief that TOSKI requested and, therefore, the district court did not err in "refusing to rule" on TOSKI's Motion.[39]

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[39] A review of the docket sheet at entry Vol. 2, Doc. 47 reveals that TOSKI's "Motion for Formal Judicial Adoption of F.R.C.P. 30(b)(2)" was not filed with the Court. See Certificate of Readiness and Transmittal of

Rule 30(b)(2) of the Federal Rules of Civil Procedure sets forth the circumstances under which a plaintiff can take the deposition of a party defendant, within thirty (30) days after the service of a summons and complaint, without leave of Court. However, as a safeguard, the Rule further provides that if such a defendant later "shows that when [i]t was served with [the Rule (30)(b)(2) notice it] was unable through the exercise of diligence to obtain counsel to represent [it] at the taking of the deposition, the deposition may not be used against the party." Id.

Accordingly, federal courts uniformly have held that Rule 30(b)(2) "only deals with the depositions of a defendant which are noticed by a plaintiff less than thirty (30) days before the service of a summons and complaint." See, e.g., Fleming v. Department of Justice, 1992 U.S. Dist. LEXIS 9753, *5 (N.D.N.Y. 1992). It is not designed to "create a general right for *pro se* litigants to bar the use of their depositions." Id. at 2 (wherein the court denied a *pro se* plaintiff's motion, under Rule 30(b)(2), to prevent

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Record on Appeal at p. 7. Moreover, Magistrate Judge Turnoff denied TOSKI's October 23, 1992 "Motion for Protective Order," Vol. 2, Doc. 32, p. 4, wherein TOSKI requested "the collateral adoption of Rule 30(b)(2) for all depositions taken in this case where the deposed party or witness is unable to obtain proper representation." See November 6, 1992 Order Denying Motion for Protective Order, Vol. 2, Doc. 33. TOSKI did not appeal Magistrate Turnoff's November 6, 1992 Order.

the defendants from making use of his deposition transcripts at trial). See also Knight v. Sanders, 988 F.2d 120 (9th Cir. 1993) (unpublished) (holding that the district court properly refused to appoint counsel to represent a *pro se* plaintiff, since Rule 30(b)(2) does not apply to a plaintiff whose deposition is being taken by a party).[40]

Like the *pro se* plaintiffs in Fleming and Knight, TOSKI sought to have the district court invoke Rule 30(b)(2) to bar Appellees from using his deposition, which was taken **more than two (2) years after the commencement of this action**, in support of their Motion for Summary Final Judgment and/or at the time of trial. However, by its plain language, Rule 30(b)(2) simply is not applicable to such a deposition. See Fleming, 1992 U.S. Dist. LEXIS 9753, *2 (stating that Rule 30(b)(2) is "irrelevant to the deposition of a plaintiff held some two (2) years after the commencement of this suit"). Accordingly, the district court did not "refuse to rule" on TOSKI's motion to "formally adopt" a Rule of Civil Procedure, because: (1) TOSKI did not properly file the motion with the district court; and (2) Rule 30(b)(2) (1993) does not afford the relief that TOSKI sought in his motion.

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[40] Copies of the unpublished opinions in Fleming and Knight are attached to Appellees' Memorandum of Law in Opposition to Plaintiff's Motion for Formal Judicial Adoption of Fed. R. Civ. P. 30(b)(2), Vol. 2, Doc. 47, Exhibits A and B.

VI. TOSKI did not move the district court to overrule Appellees' objection to deposition questions and, therefore, he did not preserve the issue for appellate review. Furthermore, TOSKI has not shown any basis or even argued that the discovery at issue was relevant to any issue in the case.

It is well-settled in the Eleventh Circuit and elsewhere that a party may not assign error to an objection to discovery, unless the party moves the district court for the entry of an order overruling the objection. See Walker Inv., Inc. v. American Exp. Field Warehousing Corp., 276 F.2d 591, 593 (5th Cir. 1960)(appellant's argument that district court erred in admitting evidence was barred by the failure to object at trial). Moreover, TOSKI has not argued that the discovery is necessary to determine any issue or relevant to any issue in the case or in this appeal. Accordingly, TOSKI's curiosity regarding the Appellees' retention of defense counsel and his unfounded claim of "conflict of interest" on the part of Appellees' counsel and EAL, cannot properly form a basis for his appeal, particularly in light of TOSKI's failure to preserve this issue for appeal by filing a motion with the district court.

VII. The remaining issues raised in TOSKI's Brief are waived.

The Eleventh Circuit has determined that the mere mention of an issue in an appellate brief, without supporting argument, is insufficient to preserve the issue for appellate purposes. Tallahassee Memorial Regional Medical Center v. Bowen, 815 F.2d 1435, 1466 n. 16 (11th Cir. 1987), cert. denied, 485 U.S. 1020 (1988). Accordingly, this Court should not consider the four (4) issues posed, without any supporting argument on pages 20 and 21 of TOSKI's Brief in the "Table of Contents"[41] and "Argument".

CONCLUSION

Based upon the foregoing arguments and authorities, Appellees, WILLIAM J. McDONNELL, JEFFERSON H. HENRY and KENDALL G. WILLIAMS respectfully request that this Court affirm the district court's entry of summary final judgment in their favor and award such further relief as this Court deems just and proper.

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[41] TOSKI's Brief, p. iii.

Respectfully submitted this 20th day of June, 1996.

ANANIA, BANDKLAYDER & BLACKWELL
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By:_____
Francis A. Anania
Florida Bar No. 160256
Richard F. O'Brien, III
Florida Bar No. 230812

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this ____ day of June, 1996 to: Bruce Richard Toski, 2361 S.W. 36 Terrace, Fort Lauderdale, Florida 33312.

By:_____
Richard F. O'Brien, II

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 20, 1995

Mr. Donald A. Blackwell
100 S.E. Second Street
One Intl. Place, Suite 3300
Miami, FL 33131-2150

Re: Bruce Richard Toski
v. William J. McDonnell, et al.
No. 94-7524

Dear Mr. Blackwell:

The Court today entered the following order in the above entitled case:

The motion of petitioner for leave to proceed in forma pauperis is denied. Petitioner is allowed until April 10, 1995, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 87-1422-CIV-ATKINS

BRUCE RICHARD TOSKI,

Plaintiff,

v.

FRANK LORENZO, JET CAPITAL CORPORATION, TEXAS AIR CORPORATION, EASTERN AIR LINES, INC., WILLIAM J. McDONNELL, KEN WILLIAMS, JOHN MacDONALD,

Defendants.

A JURY TRIAL IS REQUESTED

AMENDED COMPLAINT
APPLICATION FOR PERPETUAL
MANDATORY INJUNCTION
REQUEST FOR DAMAGES AND LEGAL FEES

NATURE OF THE ACTION

1. Plaintiff, is a duly elected representative (Shop Steward) of the International Association of Machinists and Aerospace Workers ("IAMAW") seeking immediate injunctive relief by this court, under the Railway Labor Act 45 U.S.C.A. §152 (Third, Fourth) (1986) (herein-

after as "RLA" or the "Act"); on his own behalf, and for more than 100 other duly elected representatives of the IAMAW.

2. In a sordid and concerted attempt to undermine the strength of the Union, the Defendants have willfully and knowingly violated 45 U.S.C.A. §512 (Third, Fourth) (1986) by refusing to allow numerous Union Representatives back onto company property and into employee work areas—to represent the employees that elected them—after retaliatory and baseless terminations. The wrongful discharges, however, are not the issue here. Injunctive relief should be granted regardless of whether or not the representatives are working for the Company; unless the Company can prove that the representative in question was fired for contemptuous and riotous activity.

3. It may be fairly anticipated that, unless enjoined Defendants will continue to repeat the acts and conduct set forth in Paragraph 2, or similar or like acts and conduct, in violation of 45 U.S.C. §512 of the Act. It is therefore essential, appropriate, just, and proper, for the purpose of effectuating the policies of the RLA, that, Defendants be enjoined and restrained from the commission of the acts and conduct alleged, similar acts and conduct, or repetitions thereof.

PARTIES

4. Plaintiff, Bruce Richard Toski, is Shop Stewart for the mechanics of the Ground Service Equipment repair facility ("GSE") at Eastern Air Lines ("EAL") in the Miami International Airport.

5. The International Association of Machinists and Aerospace Workers, AFL-CIO ("IAMAW") is an unincorporated labor organization with its principal office at 1300 Connecticut Avenue, N.W., Washington, D.C. The

IAMAW represents Eastern's mechanics and other ground personnel, including employees in the crafts or classes of mechanical, stores, fleet service, building maintenance, ground and plant service and part shops. The IAMAW, Eastern's largest union, has an office locally situated at 3026 N.W. 79th Ave., Miami, FL 33122. (Tel. 591-8550).

6. Defendant, Frank Lorenzo, owns 52% of the shares of Jet Capital Corp.

7. Defendant, Jet Capital Corp., an investment company which shares its headquarters and telephone numbers with Texas Air's New York office, invests jointly with Texas Air, and through a special class of super voting stock has 34% voting control.

8. Defendant, Texas Air is a Delaware corporation with its principal offices in Houston, Texas. Texas Air is a holding company which owns all of the common stock of EAL and Continental Airlines.

9. Defendant Eastern is a Delaware corporation authorized to do business, and with its principal place of business, in this judicial district. Eastern provides air passenger and freight transportation service in interstate and foreign commerce, pursuant to certificates of public convenience and necessity issued by the Civil Aeronautics Board and the Department of Transportation under the Federal Aviation Act of 1958. EAL is a carrier by air as defined by the RLA, 45 U.S.C.A. §181 (1986).

10. Defendant William J. McDonnell is a foreman of the GSE.

11. Ken Williams is the present manager of GSE.

12. John MacDonald works in the EAL Employee Relations Dept.

JURISDICTION AND VENUE

13. This court has jurisdiction of this action under 29 U.S.C.A. §101 (1973) et seq. of the Norris-LaGuardia Act, and 28 U.S.C.A. Rule 65 (1982).

14. Venue is proper in this District under 28 U.S.C. §1391.

ISSUE

15. Whether an airline, which has denied representation to its employees—by wholesale termination of union representatives, denied access, after termination, to employees on company property—is in violation of the Railway Labor Act 45 U.S.C. §152 (Third) (Fourth), henceforth subject to injunctive stricture.

FACTS

16. One week after the Plaintiff was duly elected as Shop Steward by the employees of the second shift in the Ground Service Equipment Repair Facility at EAL in the Miami International Airport, the Plaintiff was given a letter for a 5 day off suspension by William McDonnell. The next day (October 24th, 1986) Jose Posadas (Manager GSE at that time) ordered Mr. McDonnell to rescind the letter and the Plaintiff returned to work that day.

17. On the same day, October 24th, 1986, two minutes before the Plaintiff was to punch out, Mr. McDonnell, while attempting to serve another ill advised letter, assaulted the Plaintiff in the men's bathroom.

18. The Plaintiff was led to believe that EAL was going to fire Mr. McDonnell for his improper conduct and assault. Instead, the Plaintiff was terminated the day after he filed a report of the attack with the First Aid Dept. at EAL. When the Plaintiff was terminated his airport base pass and employee I.D. were confiscated.

19. The Plaintiff requested a pass from EAL Protective Services on 06/23/87 and was denied a pass, the reason given was that the Plaintiff was a terminated employee.

20. The Plaintiff requested a pass from the Metro Dade Aviation Department on 06/25/87 and was denied a pass. The reason for the denial was that EAL's permission was needed and EAL refused to grant same.

21. The Plaintiff, requested help from the Metro Police Department Substation across from the GSE shop in the Miami International Airport. Plaintiff was told that no action would commence without a court order. They advised, that if Plaintiff insisted on asserting his rights, and EAL requested my arrest for trespassing, that in all likelihood they would arrest me.

22. The Plaintiff, through General Chairman Ronald Orr of District 100, on 07/07/87, requested a pass through Mr. John MacDonald of the EAL Personnel Dept. Once again for termination reasons the pass request was denied.

23. At each contact with EAL, Plaintiff informed EAL's officers about the RLA and the clear wording of 45 U.S.C. §152. Most of the replies ran along the lines of, "So what . . . take us to court." The most memorable, though, came from Paul Priest who I talked with on 06/23/87 while in the Protective Services office. He stated, "It'll be a cold day in hell when I give you a pass."

24. Representatives of EAL under the direction of Frank Lorenzo, have harassed, attacked, terminated without cause, and denied representation to the employees of EAL.

25. Upon information and belief, Eastern Air Lines has terminated over 165 Shop Stewards in Miami, and over 350 in the entire route system, since Lorenzo acquired

control. More than 14 Chief Stewards in Miami, and more than 75 Chief Stewards in the system, have been terminated under Lorenzo in his attempt to break the spirit of the Union at EAL.

26. The Plaintiff, and other union representatives have been denied their rights to represent the employees of EAL. EAL officers under the direction of Frank Lorenzo have refused to allow the Plaintiff and other union representatives on base after their terminations. Accordingly the employees have been denied their right to choose union representatives of their own choosing.

THE LAW

27. In the early 1900s Labor was just beginning to benefit from a swelling discontent with over and misapplication of various laws in attempts by early management to prevent unions from forming. Public outcry prompted Congress to fashion one of the first Federal laws designed to protect employees in their efforts to collectively bargain. Public Law 257, H.R. 9463, approved May 20, 1926 created the Railway Labor Act; 45 U.S.C.A. §152 (Third) (1986) which states:

> Representatives . . . shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

28. An early case, *Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031 (1970), describes how courts attempted to fill in for enforcement provisions lacking in initial versions of the RLA.:

> As originally enacted in 1926, the RLA provided no express means for enforcement of the duties imposed upon carriers and their employees and their representatives by section 2. The absence of a statutory scheme of enforcement, however, did not prevent the courts from fashioning appropriate judicial remedies for violations of the Act. The leading Supreme Court decision *Texas & New Orleans Railroad Company v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 571, 50 S.Ct 427, 434, 74 LEd. 1034 (1930), where it was held that a union could sue for injunction restraining the company from interfering with its employees' right to organize and designate bargaining representatives, in violation of Section 2 (Third) of the Act. No such remedy was mentioned in the Act; indeed, at that time it did not prescribe any sanctions.

29. "Section 2 (Fourth) was added to the Act in 1934. It is largely an amplification of the duty of non-interference contained in section 2 (Third), extending that duty to the right of employees to organize and bargain collectively. There is no difference between the two provisions which would support granting enforcement of one while denying it of the other." *Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031 (1970).

45 U.S.C.A. §152(Fourth) (1986) states:

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who

> shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . ."

31. Public Law 487, S.2496, approved in 1936, amended the RLA to specifically include airlines under the Act.

32. "There can be no doubt that the RLA creates a right in favor of employees to be free from interference and coercion in the selection of bargaining representatives. *Burke* at 1034.

33. A carrier may not impose upon its employees its own version of who constitutes and qualifies as a representative for the purpose of representation at grievance or disciplinary proceedings. "The individuals employee's right to choose his own representative at grievance or disciplinary proceedings cannot be ignored or trampled . . . by the carrier. . ." Legislative history supports this conclusion. *Coar v. Metro-North Commuter R. Co.*, 618 F.Supp. 380 (D.C.N.Y. 1985).

34. In hearings of the 73rd Congress (1935) concerning the RLA, 2d Sess., p. 44, the intent of the RLA was further clarified:

> The combination of the right to designate a representative, without interference, and the right to belong to a minority union, plus the spirit of the RLA which ensures the rights of an individual, establishes that an employee is entitled to designate

a representative other than his collective bargaining union at grievance and disciplinary proceedings. Any hardship which the carrier may face by dealing with different representatives is clearly outweighed by the hardship an employee would endure if represented by a union which he believes does not represent his best interests.

35. The RLA statutorily protects the right of association and expression in union activities from interference by employers. It is the duty of the courts to give effect to that purpose when called upon to do so. See *Burke*, 433 F.2d at 1033.

36. Injunctive relief is available to prevent violation of specific mandates in the RLA and to protect employees' organizational rights under the RLA. See *Texas & New Orleans Railroad Company v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 571, 50 S.Ct 427, 434, 74 LEd. 1034 (1930) (enforcing by injunction section 2's prohibition against anti-union coercive measures by carrier). *Railway Labor Executives Ass'n v. Boston & Maine Corp.*, 808 F.2d 150, 157-58 (1st Cir. 1986) (discharge in retaliation of employees engaging in statutorily protected activity.)

37. Preliminary injunctive relief is available to a party who demonstrates either combination of probable success and possibility of irreparable harm, or that serious questions are raised and balance of hardship tips in its favor. In *Arcamuzi v. Continental Air Lines*, 819 F.2d 935 (9th Cir. 1987), the U.S. Court of Appeals remanded for re-evaluation to the District Court the denial of a preliminary injunction on the grounds that ". . the District Court failed to consider the potential non-economic harm which may flow from retaliation for protected union activity, we remand the action to the district court

to exercise its discretion in light of the appropriate irreparable injury standards." One must consider the damage and harm being done at this moment as irreparable. More than economic harm is involved when an employer retaliates against protected activity. Damages and reinstatement would not remedy the coercive and inhibitory effects upon the employees' organizational rights secured by the RLA. The discharge of active union supporters—especially front line Shop Stewards—risks a serious adverse impact on employee interest in unionization. When the System Board of Adjustment is faced with tactics calculated to undermine the union, the Courts' focus should not be on what relief may ultimately be granted to individual employees, but on the likelihood of harm to the bargaining process in the interim. Retaliatory action for protected activity carries with it the risk that employees may be deterred from engaging in legitimate conduct. See *Holt v. Continental Group Inc.*, 708 F.2d 87, 91 (2d Ct.App. 1983).

38. A party injured by violations of the RLA need not process his petition through the province of the U.S. Attorney's office. This court has stated in paragraph 6 of its October 23rd, 1987 ORDER, that, "The relief sought is not the proper remedy." The court quotes 45 U.S.C. §152 (Tenth). With all due respect to this Court, the Defendant in *Burke* Id., sought to persuade the United States Court of Appeals with the same argument. Judge Duniway in his opinion wrote:

> Defendant argues . . . a congressional intent to foreclose the right of enforcement to an individual employee acting on his own behalf. . . We find the defendant's arguments unpersuasive . . . there is no indication in the Act itself or its legislative history that Congress intended this sanction to be exclusive.

> The floor debates that preceded passage of the 1934 amendments contain no analysis of the enforcement provision. The report of the Senate Committee on Interstate Commerce indicates only that there be adequate penalties for violation of section 2 (Fourth). *Burke v. Compania Mexicana* 433 F.2d at 1033.

39. Lorenzo is well aware of the nonexistence of criminal prosecution using the RLA, despite its clear language. There has been only one case prosecuted under 45 U.S.C. §152 (Tenth) charging criminal violations of the RLA.[1] Lorenzo feels immune from any judicial retribution for the anti-union animus he has freely spread around at EAL in his attempt to break the IAMAW. In keeping with their traditional apathetic attitude towards criminal prosecution of the RLA, the U.S. Attorney's office has been no help whatsoever in helping me, the workers at EAL, or even complying with simple requests for information. This court, if unable to decide a course of action may look to *Burke v. Compania Mexicana,* 433 F.2d at 1033, 1034.

> In the absence of a clear congressional intent to the contrary, the courts are free to fashion appropriate civil remedies based on the violation of a penal statute where necessary to ensure the full effectiveness of the congressional purpose. See, e.g., *Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967); *J.I. Case Co. v. Borak,* 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); *Texas & Pacific R. Co. v. Rigsby,* 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874

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[1] *U.S. v. Winston,* 558 F.2d 105, 49 ALR Fed 601 (CA2 NY 1977) . . . from "Meaning of "Willful" under provision of RLA (45 U.S.C. §152 (Tenth) making willful failure or refusal to comply with Act a criminal offense." 49 ALR Fed 611

(1916). Where the interest asserted by the plaintiff is within the class that the statute was intended to protect, the harm of the type the statute was intended to forestall and the statutory criminal penalty inadequate to fully protect the asserted interest, a civil action for damages arises by implication. *Wyandotte Transportation Co. v. United States*, supra.

40. Controversy which is covered by the RLA is subject to prescriptions of the Norris-LaGuardia Act. 29 U.S.C.A. §102 (1973).

"In the interpretation of this chapter . . . the public policy of the United States is declared as follows: Whereas . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment . . . it is necessary that he have full freedom of association, self organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

41. The Norris-LaGuardia Act 29 U.S.C. §107 establishes the validity for the issuance of injunctions, criteria which have been fully met as follows:

(a) These unlawful acts committed by EAL will continue unless restrained by this court. EAL has made it

clear that, in their opinion, a termination of a union representative, whether justifiable or not, gives them the prerogative to keep those representatives off the base.

(b) Substantial and irreparable injury has already occurred and will continue to Plaintiff, other representatives, and indeed the continued existence the IAMAW, unless this injunction is granted. "A retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights under the Act or from providing testimony for the plaintiff in her effort to protect her own rights. These risks may be found to constitute irreparable injury." *Holt* at 91

(c) Greater injury will be inflicted upon the Plaintiff, other terminated Union Representatives, and the Union, than will be inflicted upon defendants by the granting of this injunction. There will be no harm to the defendant whatsoever in allowing representatives on base to handle grievances and represent employees. Shop Stewards for example that are using Company Time to process grievances presently, will be freed to go back to protective work. The Company will not have to pay a representative on company time to handle a union grievance. This can only help EAL in their never ending financial predicament.

(d) Plaintiff has exhausted all other adequate remedies at law. The Airport authorities will not grant a pass without EAL's permission. The Police will not force EAL to supply a pass without a Court order. Arbitration is too distant to exist as an adequate remedy.

(e) The public officers charged with the duty to protect Union representatives are unwilling (U.S. Attorney's office) and unable (the regular police dept.) to furnish adequate protection.

Wherefore the Plaintiff respectfully requests, (1) that this Court issue an Order directing Defendants to appear before this Court, at a time and place to be fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Defendants, its officers, agents, attorneys, and all members and persons acting in concert of participation with them, from further violation of the RLA as alleged herein; (2) punitive damages, and legal preparation fees, to be awarded to the Plaintiff and/or the I.A.M.A.W., for flagrant and deliberate violations of 45 U.S.C. §152 (Third), by the Defendants; (3) that this Court grant such other and further relief as the Court shall deem proper.

For the present time I would like to rescind my motion for the "Court to Vacate my Arbitration case and Move the Jurisdiction over same to a Circuit Court." I wish to reserve the right to raise this issue at a later time.

Respectfully submitted,
/s/ Bruce Richard Toski

Bruce Richard Toski
Plaintiff, pro se

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January 10, 1989

APPENDIX I

[Filed AUG 20 1987]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 87-1422-Civ-Atkins

BRUCE RICHARD TOSKI,
Representative of the I.A.M.A.W.,

Plaintiff,

v.

FRANK LORENZO,
Owner of Texas Air Corp. et al.

Defendant.

ORDER ON MOTION TO PROCEED IN FORMA PAUPERIS AND ON APPLICATION FOR A TEMPORARY RESTRAINING ORDER

THIS CAUSE is before the court on plaintiff's Motion to Proceed in Forma Pauperis and on plaintiff's application for a temporary restraining order. After due consideration of the motion, application and relevant law, it is

ORDERED AND ADJUDGED that the motion and application are *DENIED* and the action dismissed without prejudice.

The plaintiff filed an application for a temporary restraining order alleging direct violations of the Railway

Labor Act, 45 U.S.C. § 152 subd. third and wrongful discharge. This court lacks jurisdiction to grant the relief sought.

The plaintiff fails to allege exhaustion of his administrative remedies in pursuing his wrongful discharge claim. *See Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972). Furthermore, plaintiff's claims under the Railway Labor Act constitute a "minor dispute," *see, e.g., Empresa Ecuatoriana De Aviacion, S.A. v. District Lodge No. 100,* 690 F.2d 838 (11th Cir. 1982), and so subject to the compulsory arbitration procedures of section 153.

DONE AND ORDERED at Miami. Florida this 19th day of August, 1987.

/s/ C. Clyde Atkins
UNITED STATES DISTRICT JUDGE

cc: Bruce Richard Toski

[CLOSED CIVIL CASE]

APPENDIX J

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11 Case No.
89 B 10449 (BRL)

In re
EASTERN AIR LINES, INC.,

Debtor.

CERTIFICATE OF COMMENCEMENT
OF CASE PURSUANT TO
BANKRUPTCY RULE 2011

I do hereby certify that on March 9, 1989, Eastern Air Lines, Inc., the above-named debtor, filed a petition for relief under chapter 11 of title 11, United States Code.

Dated: New York, New York
March 9, 1989

/s/ Cecelia M. Lewis
Clerk of the Bankruptcy Court

/s/ [Illegible]
Deputy Clerk of the Bankruptcy Court